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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 16, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. —

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, *Respondents*.

Petition for Writ of Review—Filed Aug. 29, 1951

To the Honorable the Supreme Court of the State of California:

The United States of America, by its Acting Assistant Attorney General James R. Browning, acting under the direction of the Attorney General, respectfully petitions this Honorable Court to review the order of the Public Utilities Commission issued on July 3, 1951, rehearing of which was denied on July 31, 1951. In support of this petition the United States respectfully shows:

I

The United States of America, through the Chief of the Bureau of Yards and Docks, Navy Department, owns and operates a Naval Ammunition Depot in Hawthorne, Nevada.

II

Respondent, California Electric Power Company (hereinafter sometimes called the Company), is a corporation engaged, among other activities, in the generation, distribution and sales of electric energy in the States of California and Nevada. Included among the Company's generation facilities are five hydroelectric projects (Projects No. 344 (San Gorgonia), 1388 (Poole), 1389 (Rush Creek), 1390 (Mill Creek) and 1394 (Bishop Creek) licensed under Part I of the Federal Power Act (16 U.S.C. 792 *et seq.*)).

III

2 Respondent, Public Utilities Commission of the State of California (hereinafter sometimes called the Public Utilities Commission), is an administrative agency of the State of California, one of whose functions is the regulation of certain rates, terms and conditions under which electric energy is sold in California.

IV

Under an agreement dated July 1, 1943, the Company has been supplying the United States of America, with its energy requirements at its Naval Ammunition Depot at Hawthorne, Nevada. The energy is delivered to the Navy Department at 55Kv at the Company's substation at Mill Creek in California; from this substation the Navy Department transmits the energy to the state boundary and thence into the State of Nevada where it is reduced to distribution voltage. The energy so furnished is in part generated at three of the Company's licensed hydroelectric projects referred to in paragraph II (Projects No. 1388 (Poole), 1389 (Rush Creek) and 1390 (Mill Creek). A substantial part of the energy so purchased by the Navy Department is resold by it to domestic and commercial customers located on the Naval Reservation.

V

On July 1, 1948, the Public Utilities Commission rendered its Decision No. 41798 on the Company's Application No. 28791 in which it found generally that the Company was in need of additional revenues and authorized the Company to file and make effective rates in accordance with numerous schedules attached as an exhibit to the decision. Among these schedules was Schedule P-2, covering "Power—General Wholesale Service"; this schedule was applicable to "all general wholesale power service except agricultural, irrigation and resale power," and "in the entire territory served excluding the City of San Bernardino."

VI

Following this decision, the Company attempted to terminate its contract with the United States, set forth in paragraph IV, by giving written notice, and thereafter sought to bill the United States at the rates provided in Schedule P-2. The United States refused to pay the rates prescribed in this schedule on the grounds, among
3 others, that the decision does not specifically refer to its contract with the Company and further that the Public Utilities Commission did not have jurisdiction to prescribe the rates for these sales by the Company to the United States.

VII

On August 8, 1949, the Company filed its First Supplemental Application to Application No. 28791 (referred to in paragraph V) with the Public Utilities Commission requesting a determination whether Schedule P-2 was, and had since October 1, 1948, been

applicable to the Company's sales of electric energy to the United States referred to in paragraph IV. The United States protested this application, appeared at the hearings thereon and was a party to the proceedings relative thereto. A hearing on this application was held on October 7, 1949, and although further hearings were scheduled, they were taken off the calendar when the Federal Power Commission indicated a desire to explore the question of jurisdiction.

VIII

On February 15, 1950, the Federal Power Commission issued an order to the Company, directing it to show cause, among other things, why the rates for the Company's sales of electric energy to the United States referred to in paragraph IV are not subject to the jurisdiction vested in the Federal Power Commission under the Federal Power Act (16 U.S.C. 792, *et seq.*). *In the Matter of California Electric Power Company*, F.P.C. Docket No. E-6269. On March 20 and 21, 1950, pursuant to mutual agreement between the Public Utilities Commission and the Federal Power Commission, concurrent hearings were held before both Commissions on, *inter alia*, the jurisdictional issues involved. The Legal Department of the Public Utilities Commission intervened in the Federal Power Commission proceedings and was a party thereto.

IX

On April 13, 1951, the Federal Power Commission issued its opinion and order (Opinion No. 212) holding that the terms and conditions of the Company's sales of electric energy to the United States referred to in paragraph IV were subject to its jurisdiction under the Federal Power Act; and directing that such sales be made under the terms of the contract between the Company and the United States, dated July 1, 1943. On June 5, 1951, the Federal Power Commission denied the applications for rehearing filed by the Company and the Legal Department of the Public Utilities Commission and on June 20, 1951, the Company filed in the United States Court of Appeals for the Ninth Circuit a Petition to Review and Set Aside the order of the Federal Power Commission referred to above in this paragraph. *California Electric Power Company* v. *Federal Power Commission*, Court of Appeals No. 12987.

X

On July 3, 1951, after the Federal Power Commission issued its order holding that exclusive jurisdiction over the Company's sale to the Navy was vested in it, the Public Utilities Commission issued its opinion and order (Decision No. 45913) holding that exclusive

jurisdiction over these sales by the Company to the United States was vested in it (and not in the Federal Power Commission) and authorizing the Company to charge and collect for these sales, the rates prescribed in its Schedule P-2 referred to in paragraph V. A copy of this Opinion is attached hereto, marked Exhibit "A" and by this reference made a part hereof. On July 19, 1951, the United States, being aggrieved thereby, filed with the Commission a petition for rehearing, setting forth the particulars in which the United States alleged the Commission committed error. A copy of this Petition for Rehearing is attached hereto, marked Exhibit "B" and by this reference made a part hereof. On July 31, 1951, the Commission denied the petition for rehearing, without hearing or modification of its order of July 3, 1951.

XI

The United States avers that the Commission, in rendering its opinion and order of July 3, 1951 and in denying the application of the United States for rehearing thereon, committed error and acted without and in excess of its powers and jurisdiction particularly as follows:

(1) In holding that the sales of electric energy by the Company to the United States, referred to in paragraph IV, are not in interstate commerce, either under the general law or within the meaning of the term as used in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83,

5

(2) In holding that even if these sales were in interstate commerce, the provisions of Parts I and II of the Federal Power Act (16 U.S.C. 792 *et seq.*), permitted it, rather than the Federal Power Commission, to regulate these sales,

(3) In rendering these rulings in square conflict with the conclusions of the Federal Power Commission on these very issues in a proceeding in which the Public Utilities Commission's Legal Department participated as a party and the decision in which is now under review in the Court of Appeals for the Ninth Circuit, and

(4) In construing its Decision No. 41798 of July 1, 1948 to cover these sales to the United States, and ruling that its Schedule P-2 applied to these sales, all as set out in greater detail in the United States' Petition for Rehearing before the Public Utilities Commission, attached hereto as Exhibit "B."

XII

The United States has not the right to appeal from the Commission's Opinion and Order of July 3, 1951, and has no plain, speedy or adequate remedy other than by this Writ of Review.

The United States is a party beneficially interested in this proceeding, and the names of the parties interested whose rights will be affected by this Petition are the United States, the Petitioner herein, and the Public Utilities Commission and the Company, both Respondents herein.

XIII

The United States is applying to this Court because it is provided in the Public Utilities Act, Section 67, that a Petition for Writ of Review may be addressed to this Court in such cases.

WHEREFORE, the United States prays:

(1) That a Writ of Review issued out of this Court to the Public Utilities Commission commanding it to certify fully to this Court at a specific time and place the records and proceedings in said First Supplemental Application to Application No. 28791, and that the same be inquired into and determined by this Court.

(2) That said matters and record be fully determined and considered by this Court, and that it be ordered, adjudged and decreed that the Order made by the Public Utilities Commission in this matter against the United States be annulled, vacated and set aside.

(3) That in the meantime the Public Utilities Commission and the Company be required to desist from further proceedings in said matter to be reviewed, and that the Public Service Commission be required to refrain from any further action therein.

(4) That the United States recover its costs herein; and for such further and additional relief as may be proper and just in the premises.

DATED: this 27th day of August, 1951.

JAMES R. BROWNING
James R. Browning,
Acting Assistant Attorney General
PAUL A. SWEENEY
Paul A. Sweeney,
MELVIN RICHTER
Melvin Richter,
Attorneys, Department of Justice.
/s/ R. A. MCMILLAN,
Asst. U. S. Attorney

Duly sworn to by Melvin Richter. Jurat omitted in printing.

7 CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served the above "Petition for Review," upon Respondents Public Service Commission of the State of California, and California Electric Power Company by mailing a copy thereof properly addressed, postage prepaid, to:

Public Utilities Commission of the
State of California
San Francisco 2, California
Henry W. Coil, Esquire
care California Electric Power Company
Riverside, California

(SEAL) MELVIN RICHTER
Attorney, Department of Justice

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8 **Exhibit "A" to Petition**

Decision No. 45913

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application No. 28791—1st and 2nd Supplemental

APPLICATION OF CALIFORNIA ELECTRIC POWER COMPANY FOR AN INCREASE IN RATES.

Henry W. Coil, for applicant, California Electric Power Company; *Fred E. Parker* and *L. B. B. Lindstrom*, for Mineral County Power System; *Oliver Rands, Hamilton Treadway*, and *F. W. Denniston*, for the United States Navy; *Boris H. Lakusta*, for the Commission's staff.

Opinion

California Electric Power Company, by its first and second supplemental applications in this proceeding, seeks determinations whether the Commission's Decision No. 41798 of July 1, 1948, authorizing certain rate increases, applies, respectively, to sales to the Navy, for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada, and to sales to Mineral County Power System for resale to consumers in Nevada. Applicant requests that such determinations be made in the affirmative, thus making the utility's Schedule P-2 applicable to the sales to the Navy and its Schedule P-3 applicable to the sales to Mineral County Power System. Should the Commission construe the decision not to apply, applicant seeks the establishment of appropriate rates for such sales.

Both supplemental applications refer to the matter of jurisdiction and the position is taken that jurisdiction lies in the California Commission rather than in the Federal Power Commission.

A hearing on the applications was held on October 7, 1949.
9 The evidence received at that time related only to the questions whether Decision No. 41798 is to be construed to apply to the sales referred to and whether, as related to such sales, the rates set forth in such decision, or some other rates, are reasonable. A further hearing was scheduled but taken off calendar when the Federal Power Commission evinced, through correspondence, a desire to explore the question of jurisdiction. In implementation thereof, on February 15, 1950, it issued an order to show cause against California Electric Power Company. On March 20 and 21, 1950, pursuant to mutual agreement between that Commission and this, a concurrent hearing was held which, in so far as this Commission was concerned, bore solely upon the jurisdictional question. It was announced by Commissioner Rowell that, if additional evidence should be deemed advisable at a later date, due notice would be given.

It should be stated at the outset that the Commission is now satisfied, after a careful weighing of the record, that no further evidence is necessary, satisfactorily to dispose of the issues raised by the two supplemental applications. Accordingly, the order herein will include submission.

California Electric Power Company Operations.

California Electric Power Company renders public utility electric service in southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside, and Imperial counties. Its Nevada Division serves parts of Nye and Esmeralda counties, Nevada. Fifty-five per cent of all electricity supplied by the company comes from its own generating sources. The other forty-five per cent is obtained from Southern California Edison Company, the Department of Water and Power of the City of Los Angeles, and neighboring electric production agencies with which California Electric maintains interconnections.

10 During 1950, California Electric served an average of about 56,000 customers, 98 per cent of whom were in California. Residential and domestic customers purchased 11 per cent, rural customers, 15 per cent, industrial and commercial customers, 61 per cent, and other customers, 13 per cent, of California Electric's energy sales.

The company's production sources are interconnected with a network of high-voltage lines extending southerly from Mono County to San Bernardino about 300 miles along the easterly slope of the

Sierra Nevada Mountains, also extending throughout its main system around San Bernardino and Riverside, and easterly from Victorville some 200 miles to Hoover Dam Power Plant. In 1950, the maximum system demand was 123,900 kw.

The two customers, Mineral County Power System, with a demand of about 1,000 kw, and the Navy, with a somewhat greater demand, are served in California from the 55 kv station bus at California Electric's Mill Creek generating plant. Each customer owns and operates a 55 kv line, including terminal switching facilities, extending from Mill Creek to Hawthorne, Nevada. The lines are about 55 miles in length, about half the distance being in California and the other half in Nevada. During periods of emergency trouble, these customers have arranged to use the more reliable Navy line jointly. California Electric adjusts its billing to conform to the disposition of deliveries upon advice from the customers. Mineral County Power System resells the energy it purchases to its retail customers in Nevada. The Navy uses its deliveries, supplemented by its own fuel generating plant, for the power and energy requirements of its industrial activities and for the residential and commercial needs of employees or personnel housed at the military reservation.

Construction of Decision No. 41798.

11 In Application No. 28791, California Electric sought a general increase in rates. It proposed increases in all of its filed tariff rates and in a number of special contract rates. It did not request authority to increase the rates contained in the then effective special contracts applicable to sales to the Navy and to Mineral County Power System.

For the rate proceeding, studies of the trend and projected level of applicant's revenues and expenses were made by applicant, by other interested parties, and by engineers of this Commission's staff. As can be seen from the exhibits in the proceeding, from the annual reports of applicant to this Commission, and from the testimony of the Electrical Engineer of this Commission, the revenues and expenses in connection with the sales to the Navy and Mineral County Power System were included in the statistics upon which the earning studies were based. In Decision No. 41798, the Commission concluded that applicant was entitled to an increase in rates. In prescribing rates, it undertook to spread the increase equitably among the several classes of consumers in accordance with accepted practice. The Commission indicated its dissatisfaction with special rate contracts and directed applicant to discontinue a substantial number of special rates. It prescribed Schedules P-2 and P-3 for customers of the same type and kind as the Navy

and Mineral County Power System, respectively. It made those tariffs applicable to all similar customers on the California system except in the City of San Bernardino. It further satisfied itself that the credit for deliveries to the Nevada system was at a level substantially comparable to the wholesale power schedule. By establishing such rates, the Commission was satisfied that each customer would be required to pay no more than was necessary and that no customer would obtain service at the expense of other customers.

12 Mineral County Power System and the Navy were served under special contract rates differing from filed tariff rates for a number of years. The rates effective for Mineral County Power System during the pendency of the rate proceeding, Application No. 28791, were those set forth in a contract dated October 5, 1945, which specified a term of three years. The rates applicable to the Navy were set forth in a contract effective for the period July 1, 1943, to June 30, 1944, and thereafter until sixty days' written notice by either party.

The rates prescribed by Decision No. 41798 became effective August 1, 1948. By letter dated July 30, 1948, California Electric notified the Navy of the termination of the July 1, 1943, contract, to be effective October 1, 1948. The contract with Mineral County Power System by its own terms expired on October 4, 1948. Since no new contract rates were sought for either the Navy or Mineral County Power System, the Schedules P-2 and P-3, respectively, became applicable on October 1 and October 5, 1948, respectively, unless Decision No. 41798 should be construed not to apply.

Decision No. 41798 does apply, as we construe it, to the sales to the Navy and Mineral County Power System. It is true that the decision does not refer specifically to such sales, but there can be no doubt from its comprehensive language and general tenor, to say nothing of the evidence upon which it is based, that it was intended to cover all sales of California Electric. The decision states:

"As previously noted, a number of applicant's deliveries to large customers are made under special contract agreements at rates other than those contained in the filed tariffs. Under the request contained in the application, the Commission is asked to authorize applicant to make effective certain changes in special contracts. Several of the existing contracts under their present terms and conditions provide for the application of any newly effective tariffs authorized. The remaining contracts providing for deliveries at special rates
13 either have expired or, within the next twelve months, will expire or may be terminated by applicant. Under these circumstances it appears unnecessary for the Commission to

order at this time the termination or extensive modification of any existing special contracts."

The decision further states:

> "The tariffs herein authorized are intended for application to all electric sales by applicant to customers in California, excepting only those sales to other distributing agencies with whom applicant has interchange agreements. . . . In any one area a single rate will apply to all service to domestic customers; . . . a large block power rate will provide for the major industrial and commercial deliveries; . . . and a resale power rate will apply to deliveries for resale purposes."

We indicated in the decision that the conditions surrounding the utility's service no longer warranted special contracts except in rare instances. Accordingly, we ordered that such contracts in all instances but four be terminated on July 31, 1948, or thereafter at the earliest dates possible under the terms of the respective contracts.

Having construed our Decision No. 41798 as applicable to the sales to the Navy and Mineral County Power System, we turn to the question of jurisdiction.

Jurisdiction.

The question is presented whether California is precluded from jurisdiction over the sales to the Navy and Mineral County Power System, either by virtue of the interstate commerce clause operating of its own force, or by enactment of the Federal Power Act (1935, c. 687, 49 Stat. 841, 16 USCA Sec. 791, *et seq.*). In arriving at the conclusion that jurisdiction is not precluded, we have been substantially aided by the several briefs filed in connection with the concurrent hearing. We are not unmindful that the Federal Power Commission, in its Opinion No. 212 issued on April 13, 1951, asserted jurisdiction, Commissioner Smith dissenting. It may be noted that the Federal Examiner had prepared an 14 opinion stating that the Federal Power Commission was without jurisdiction. Rehearing was denied on June 6, 1951.

We will consider separately the sales to the two customers.

Sales to the Navy.

The service to the Navy was begun, as indicated above, in 1943 pursuant to a contract for the sale of all energy required by the government "for use of the Government's Naval Ammunition

Depot, Hawthorne, Nevada, except such electric energy as may be generated by the government on said premises." The energy purchased by the Navy is consumed wholly on the Naval reservation which, in addition to the installations devoted directly to Naval use, includes the quarters for Naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provides living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation.

The evidence indicates that, while a large percentage of the energy furnished to the Navy is derived from licensed projects, there are times when all or a portion of it comes from non-licensed sources.

As stated above, the energy is delivered by California Electric to the Navy at Mill Creek and transmitted by the Navy over its own line to Nevada for consumption.

It is our opinion that upon such facts there is nothing either in the interstate commerce clause of the Federal Constitution or in the Federal Power Act to preclude our jurisdiction.

Considering first the interstate commerce clause, the United States Supreme Court held in *P. U. C.* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 L. ed. 549, P.U.R. 1927B 348, in a case where no federal statute delineating state and federal jurisdiction was involved,[1] that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as the interstate business carried on between the two utilities is essentially national in character, and state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint on that which, in the absence of federal regulation, should be free.

Even if it be assumed that the sales by California Electric to the Navy are in interstate commerce, regulation by the State of California of the rates for such sales does not fall within the proscription of the *Attleboro* decision. Only one state, viz., California, is directly concerned, *since no state can have jurisdiction over the Navy, an arm of the federal government.* Nevada has no jurisdiction over the rates the Navy pays to California Electric, nor over the rates the Navy charges its personnel and tenants. *California's jurisdiction arises solely from its authority over California Electric.* Thus, there is absent that potential clash of respective state

[1] The Federal Water Power Act (1920, Ch. 285, 41 Stat. 1063, later incorporated as Part I of the Federal Power Act, 16 USCA, Sec. 792, *et seq.*) was in effect at the time of the *Attleboro* decision but was not applicable because the electric power in question was not derived from projects licensed by the federal government.

interests which underlay the conclusion in the *Attleboro* decision.

Perhaps an even more conclusive circumstance for the proposition that the interstate commerce clause does not preclude California jurisdiction is the fact that electric rates prescribed by our Commission are *not* the rates which a utility must charge an arm of the United States Government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that
16 an electric utility may furnish electric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments." (See Public Utilities Act, Section 17.) Thus, while the difference between charges under filed tariffs which have been found reasonable, and the revenue actually received for service supplied to the federal government, would have to be borne by California Electric rather than its customers, the federal government is in no way burdened in its negotiations with the utility by a California rate order.

It follows that since a sister state is not deprived of anything to which it is entitled and the federal government is in no way burdened, by the exercise of California jurisdiction, such jurisdiction does not impose an undue burden upon interstate commerce and, therefore, does not violate the interstate commerce clause of the Federal Constitution.

It should be noted in passing that the situation here presented is distinguishable from the *Attleboro* decision not only for the reasons already stated but because the sales to the Navy are not sales by one utility to another utility for resale. The Navy is not in business; its purchases of electricity are in furtherance of its national defense obligation; and its undertaking to provide electric service to its personnel and tenants at Hawthorne is merely incidental thereto.

Not only do we conclude that the interstate commerce clause presents no barrier to the exercise of our jurisdiction over the sales to the Navy, but we find nothing in the Federal Power Act taking such jurisdiction away. Such conclusion is reached even if it be assumed that Part I of the Act (setting forth the provisions applicable where power from licensed projects is involved) and Part II (applying "to the sale of electric energy at wholesale in interstate commerce but . . . not . . . to any other
17 sale") both apply, or that either Part I or Part II applies. See *Safe Harbor Water Power Corp.* v. *FPC* (CCA 3d, 1941), 124 F. 2d 800, cert. dnd. (1942), 316 U. S. 663, 86 L. ed. 1740; *Safe Harbor Water Power Corp.* v. *FPC* (CA, 3d, 1949), 179 F. 2d 179, cert. dnd. (1950), 339 U. S. 957, 94 L. ed. 1368.

Turning first to Part I (derived from the Federal Water Power Act (1920, ch. 285, 41 Stat. 1063)), if it be assumed that the sales

to the Navy are in interstate commerce, the applicable language is found in Section 20 providing, in so far as pertinent, that when:

> "said power or any part thereof [presumably any power furnished by a licensee] shall enter into interstate or foreign commerce the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable . . . to the customer . . .; and whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their properly constituted authorities on the services . . . or . . . rates . . . jurisdiction is hereby conferred upon the [Federal] Commission . . . to regulate . . . so much of the services . . . and . . . rates . . . therefor as constitute interstate or foreign commerce . . ."

It will be observed that Congress has conferred jurisdiction on the Federal Power Commission under Section 20 only if any of the states directly concerned has not provided a commission or other authority to enforce the requirements of Section 20 within such state ("requirements" apparently referring to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable), and furthermore, even though the requisite state commissions or other authorities have been provided, only if the states directly concerned are unable to agree on the services or rates through their properly constituted authorities.

18 Assuming that the language of Section 20 applies at all, it is our opinion that, under such language, the sales to the Navy are excluded from Federal Power Commission jurisdiction. The California Commission is the kind of state "commission or other authority" contemplated by Section 20, for it has comprehensive power to regulate electric utility rates and service "within such state," viz., California. We have already pointed out, in considering the interstate commerce clause, that California is the only state which can, because of its authority over California Electric, affect the sales to the Navy. Nevada cannot order the Navy to pay a certain rate for electricity purchased, nor can it order the Navy to charge a certain rate for electricity distributed. It follows that, since only one state is "directly concerned," no question can arise of inability as between two states directly concerned to agree on the reasonableness of the rates charged to the Navy. Thus, Federal Power Commission jurisdiction is excluded because the

two conditions to its exercise, as prescribed by Congress in Section 20, are absent.

Turning to Part II of the Federal Power Act (enacted as part of the Public Utility Act of 1935, ch. 687, 49 Stat. 803), it is declared in Section 201(b) that:

> "The provisions of this Part shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . ."

In addition to this jurisdictional language, it is provided in the policy declaration of Section 201(a) that federal regulation of the "sale of such [electric] energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those matters which are not subject to regulation by the states."

Putting aside the question whether the sales are in interstate commerce, it is clear that the sales to the Navy do not fall within the language "sale of electric energy at wholesale," which is defined by Section 201(d) to mean "a sale of electric energy to any person for resale." The sales in question are neither sales to a "person" nor are they sales "for resale."

The word "person" is defined by Section 3(4) of the Act to mean "an individual or corporation." A "corporation" by Section 3(3):

> "means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' . . ."

It is obvious that the Navy is not a "person" as defined.

Not only is the Navy not a "person" but the sales to it cannot properly be described as "sales for resale." We have already alluded to the contract entered into in 1943 whereby California Electric agreed to supply "all electric energy required by the Government . . . for use of the Government's Ammunition Depot . . ." The evidence shows that the use in fact made of the energy furnished is consistent with such language. All of the energy is consumed on the Naval reservation; part is used in the Depot's industrial operations or dissipated in system losses; the balance is used by the individuals and business establishments located on the government reservation. Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege ceases

upon termination of employment. For the business concessions, the government issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot."
20 It follows that the sales to the Navy are in effect for its sole use. It is true that, in supplying electricity to those living or conducting business at the reservation, the Navy is in a sense "reselling" energy purchased from California Electric Power Company, but it is clear that the term "sale for resale" in Part II of the Federal Power Act was intended to refer to a very different situation. The courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision. See *Jersey Central Power & Light Co.* v. *FPC* (1943), 319 U. S. 61, 87 L. ed. 1258, 63 S. Ct. 953. The Navy is certainly not a public utility. Even assuming it would not be precluded from that status by virtue of its position in the federal government it could not be deemed a public utility by virtue of furnishing electricity to tenants whose continued tenancy depends upon the needs of the Navy landlord.

We are satisfied, in the light of the foregoing observations, that the sales to the Navy are not to a "person for resale" under Part II of the Federal Power Act, but quite aside from that conclusion jurisdiction is denied the Federal Power Commission by the proviso clauses of Sections 201(a) and 201(b) of Part II. Section 201(a) declares that federal regulation shall "extend only to those matters which are not subject to regulation by the States" and Section 201(b), in making Part II applicable to "sales at wholesale in interstate commerce", contains the proviso that Part II "shall not apply to any other sale of electric energy." Taking these sections together and construing them in the light of their statutory history, it is plain that Congress intended the Federal Power Commission to have jurisdiction only in that area where the United States Supreme Court had declared state regulation over sales could not be exercised because of the interstate commerce
21 clause. See *Connecticut Light and Power Co.* v. *FPC* (1945), 324 U. S. 515, 89 L. ed. 1150, 65 S. Ct. 749. In the case presented here, we have already pointed out that the interstate commerce clause does not apply to prevent state jurisdiction and we have further pointed out that the machinery set up by Congress in Section 20 of Part I to enable states upon certain conditions to exercise jurisdiction without burdening interstate commerce is available upon the facts shown and makes it possible for California to regulate the sales to the Navy. Thus, both under the Constitution and Part I of the Federal Power Act, California may exercise jurisdiction. Therefore, the provisos of Sections 201(a) and 201(b) in Part II operate to deny Federal Power Commission

jurisdiction under Part II. It follows that there is nothing in Part II to prevent the exercise of California jurisdiction over the sales in question, and we so conclude.

Sales to Mineral County Power System.

As previously noted, California Electric sells electric energy to Mineral County Power System at Mill Creek, and the latter transmits the energy over its own line to Nevada, reselling to local consumers in Nevada. As in the case of the Navy, the evidence indicates that, while a large percentage of the energy is derived from licensed projects, there are times when all or a portion of it comes from non-licensed sources.

Many of the propositions set forth above in support of our conclusion that we may properly exercise jurisdiction over the sales to the Navy apply with equal force to the sales to Mineral County Power System. However, there are certain differences which will be pointed out in the analysis which follows.

We have stated that independently of any consideration of federal statute, the interstate commerce clause does not operate to prevent California from exercising jurisdiction over the sales
22 to the Navy inasmuch as no clash between state interests can be involved and inasmuch as the national government is not burdened by the exercise of California jurisdiction. A different situation exists with the sales to Mineral County Power System, for the State of Nevada clearly has an interest in the cost of electricity to Mineral County Power System and the rates in turn charged by it to its customers. Turning to the Federal Power Act, however, we are satisfied that the machinery set up in Section 20 of Part I, which allows state jurisdiction under certain conditions, when applied to the facts in issue enables this Commission to exercise jurisdiction without interfering with the rights of Nevada and without imposing an undue burden on interstate commerce. We are further satisfied that Part II does not apply because the sales to Mineral County Power System are not to a "person" as defined. We are further satisfied that, even if Part II were construed to apply, the proviso clauses alluded to in Sections 201(a) and 201(b) of Part II operate to preserve the exercise of jurisdiction recognized in Part I.

Turning specifically to Part I, we have pointed out that two conditions must, by the terms of Section 20, be present before states directly concerned may exercise jurisdiction: (1) they must have commissions with authority to enforce the requirements of Section 20 within the state; (2) such states must not be unable to agree upon the rates to be charged. In the case of the sales to Mineral County Power System, (1) each of he states directly con-

cerned, viz., California and Nevada, *has* provided "a commission or other authority to enforce the requirements of this section within such state," and (2) such states *have not*, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question.

Considering the first of these propositions, it cannot be seriously contended that the California Commission, entrusted
23 as it is with very broad regulatory authority over the rates and services of utilities within the state, fails to qualify as "a commission or other authority to enforce the requirements of this section within such state." While the Nevada Public Service Commission does not exercise as great a degree of control over Mineral County Power System as it does over private organizations engaged in public service in Nevada, it nevertheless has express jurisdiction over Mineral County Power System's rates. Nevada Statutes of 1925 provide at page 55:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis added.)

The question makes clear that the Nevada Public Service Commission is, with respect to Mineral County Power System's rates, "a commission or other authority to enforce the requirements of this section within such state."

The Federal Power Commission, adopting the contentions of its counsel, has declared in its Opinion No. 212, above referred to, that in order to qualify as "a commission or other authority to enforce the requirements of this section within such state," a commission must have authority not only to regulate the rates charged by a utility but the rates such utility pays for power purchased outside the state and transmitted in interstate commerce. It is claimed that the Nevada Commission does not qualify because it is not empowered to fix the rates Mineral County Power System pays to California Electric Power Company in California. We are convinced, however, that Congress did not contemplate state
24 commissions with powers beyond those normally entrusted to them, powers which might indeed be found to be unconstitutional.

Turning to the second proposition, there was no evidence whatever to indicate that California and Nevada "through their properly constituted authorities" were "unable to agree." No evi-

dence whatever was offered respecting any course of dealing, or any absence thereof, between the California and Nevada commissions, or between any other authorities of the respective states. The Chairman of the Nevada Public Service Commission, stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He further stated:

> "The State of Nevada, therefore, is not interested except to the extent that the users are living in Nevada and, therefore, I will say that we are very much interested. I am not prepared to state at this time what the position of our Commission would be, until after this matter of jurisdiction has been decided. That is all the statement I wish to make."

These words make apparent that there was no inability to agree, and that the Nevada Commission has adopted a neutral position.

It follows that, since neither of the circumstances prevail upon which Federal Power Commission jurisdiction is conditioned under Section 20, jurisdiction properly may be exercised by this Commission over the sales to Mineral County Power System, at least until such time as the properly constituted authorities of California and Nevada are unable to agree on the rates to be charged for such sales.

Considering next the effect of Part II upon our jurisdiction, we observed in discussing the sales to the Navy that that Part gives the Federal Power Commission jurisdiction only over sales "to any person for resale." The sales to Mineral County Power System undoubtedly are "for resale" but they are not sales to a "person." Section 3(4) defines a "person" as "an individual or corporation." A "corporation" by Section 3(3) "shall not include 'municipalities' as herein defined." A "municipality" by Section 3(7) means "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power . . ." Mineral County Power System, as we understand it, is the operating name for the County of Mineral in its proprietary capacity as the seller of electric energy at retail. Thus, it is a "municipality" as defined in Section 3(7) and, therefore, is excluded from the definition of a "corporation" in Section 3(3) and from the definition of a "person" in Section 3(4). It follows that Part II does not apply to the sales to Mineral County Power System.

Finally, even if the sales to Mineral County Power System were to be regarded to be within the purview of Part II, the proviso clauses of Sections 201(a) and 201(b) apply. Our views heretofore stated respecting them apply with equal force. Since by the

provisions of Part I, Section 20, the California Commission upon the facts may exercise jurisdiction, the proviso clauses in Part II operate to ensure that jurisdiction by denying it to the Federal Power Commission.

In the light of the conclusion we have reached respecting the construction properly to be placed upon our Decision No. 41798 and the conclusion that we have jurisdiction over the sales both to the Navy and to Mineral County Power System, we herewith order as follows:

Order

The first and second supplemental applications of Cali-
26 fornia Electric Power Company having been duly considered after hearing and the filing of briefs, and it appearing that no further hearing is necessary to dispose of any of the issues presented, and the Commission finding that it has jurisdiction in the premises,

IT IS HEREBY ORDERED that the matters upon each of the supplemental applications herein are submitted.

IT IS FURTHER ORDERED that California Electric Power Company is hereby authorized to charge and collect from the United States for electric service furnished at the Mill Creek hydroelectric generating plant and transported by the United States to the United States Naval Ammunition Depot at Hawthorne, Nevada, the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule P-2 attached to such decision.

IT IS FURTHER ORDERED that California Electric Power Company is hereby authorized and directed to charge and collect from Mineral County Power System for electric service furnished at the Mill Creek hydroelectric generating plant and transported by Mineral County Power System or the United States into Nevada for resale by Mineral County Power System, the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule P-3 attached to such decision.

IT IS FURTHER ORDERED that California Electric Power Company take all reasonable steps to collect from Mineral County Power System the charges hereinabove referred to from the time that such charges become effective.

Dated, San Francisco, California, this 3rd day of July, 1951.

(SEAL)

R. E. MITTELSTAEDT
JUSTUS F. CREAMER
HAROLD P. HULS
KENNETH POTTER
PETER E. MITCHELL
Commissioners

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Exhibit "B" to Petition

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application No. 28791—1st and 2nd Supplemental Application of California Electric Power Company for an Increase in Rates

Petition of the United States for Rehearing, for Extension of Effective Date of Order, and for Suspension of Operation of Order

The United States of America hereby petitions the Public Utility Commission of the State of California for a rehearing of the matter determined by the Commission's Decision No. 45913 on July 3, 1951, for the extension of the effective date of the order entered therein, and for the suspension of the operation of said order until final determination is had of the petition entitled *California Electric Power Company* v. *Federal Power Commission* filed in the United States Court of Appeals for the Ninth Circuit by California Electric Power Company to Review and Set Aside the Order of the Federal Power Commission entered in Docket No. E-6269, In the Matter of California Electric Power Company, Opinion No. 212 of April 13, 1951.

I

The Petitioner is a sovereign power represented by the Chief of the Bureau of Yards and Docks, Navy Department, and was represented before this Commission in the hearing of the 1st Supplemental Application to Application No. 28791 and is a party to the proceeding.

28

II

The Petitioner applies for a rehearing for the reasons:

(1) That the record of the proceeding is incomplete in regard to the question of whether the rate increase authorized by the Commission's Decision No. 41798 of July 1, 1948, should be applicable to sales of electric service to the U. S. Naval Ammunition Depot at Hawthorne, Nevada, in that there was no opportunity or provision for the filing of briefs or the making of oral argument.

(2) That there was no showing before this Commission nor any finding by this Commission that an increase in rates for electric service to U. S. Naval Ammunition Depot at Hawthorne, Nevada, was justified, and, indeed, the uncontroverted testimony indicated that the such existing rates more than fully compensated the applicant for the cost of service to U. S. Naval Ammunition

Depot at Hawthorne, Nevada, including a reasonable rate of return for facilities allocable to the providing of this service.

(3) That said Decision No. 41798 in specifying the special contracts to be cancelled by the Company did not include contract NOy-7342 for service to the U. S. Naval Ammunition Depot at Hawthorne, Nevada, and further stated that:

> "It is recognized that occasionally there exist with respect to electricity sales and deliveries to a customer extraordinary circumstances which are not provided for in a filed tariff designed for general application to a class of customers." (page 16).

In the hearing on October 7, 1949, extensive and uncontroverted evidence was introduced showing that the conditions for pro-
29 viding service to the Hawthorne Naval Depot were unlike those obtaining for service to any customers under the filed schedules to wit:

(a) that power is taken at the transmission voltage of 55 KV at the Company's Mill Creek generating station,

(b) that the oil switching equipment used by the Company at its Mill Creek Station to furnish service to the Mineral County Power System and to the Hawthorne Naval Depot is owned by the United States,

(c) that it is transmitted over a 55-mile line owned and maintained by the United States,

(d) that it is distributed by means of lines and equipment owned and maintained by the United States,

(e) that this line is used, without expense to the Company, to carry power to Mineral County Power System whenever a breakdown occurs in the transmission line serving that load, and that in such cases Mineral County's energy consumption is measured by a Navy-owned and operated meter located at Hawthorne, Nevada, while Mineral County is billed directly by the Company on the basis of this Navy-meter reading,

(f) that the United States maintains standby generating facilities at the Hawthorne Naval Depot with a capacity of 2800 KVA to serve either the Depot or Mineral County Power System in case of line breakdown.

The Commission's Decision No. 45913, however, fails to give proper weight to or consideration of this evidence, and, in construing the earlier Decision 41798 also failed to apply the above-quoted principle regarding special contracts to the facts at issue.

30 (4) That the Federal Power Commission has exclusive jurisdiction over the conditions and rates of electric service supplied by the Company to U. S. Naval Ammunition Depot at Hawthorne, Nevada, pursuant to the Federal Power Act, 16 U.S.C. 792 to 825, for the reasons set forth in said Opinion No. 212 of the Federal Power Commission.

(5) That the orders contained in said Opinion No. 212 of the Federal Power Commission, until set aside, have the force of law no less so than a specific act of the Congress of the United States; and the effect of those orders is to exclude any exercise of a conflicting state power by reason of the supremacy clause of the United States Constitution (Article 6, Clause 2).

(6) That the evidence and questions of law regarding jurisdiction involved in this proceeding are identical to those involved in Federal Power Commission Docket No. E-6269 and, being questions of federal law, the orderly and efficient administration of justice will best be served by a single proceeding and that, the petition *California Electric Power Company* v. *Federal Power Commission* in the United States Court of Appeals for the Ninth Circuit, in which proceeding the Commission may intervene as an interested party.

(7) That California Electric Power Company will stand in contempt of the Federal Power Commission's Order in Opinion No. 212 if it attempts to charge and collect the rates purportedly authorized by this Commission's Order in Decision No. 45913, and it is unseeming that this Commission should thus authorize acts by a public utility company that will place it in contempt of
31 the orders of a federal agency whose orders have the force of law.

III

The Petitioner further asks that the effective date of the order in Decision No. 45913 be extended for the period of the pendency of this petition for rehearing because of the importance of the issues involved herein, because of the conflict between the rulings of this Commission and of the Federal Power Commission, and because of the fact that this decision, dated July 3, 1951, was received by the Petitioner in Washington on July 9, 1951, thereby providing insufficient time for the Petitioner to submit this petition ten days or more before the effective date of the order.

IV

The Petitioner hereby petitions for the suspension of the operation of the Order contained in this Commission's Decision No.

45913, whether the petition for rehearing is granted or denied, until final determination is had of the petition *California Electric Power Company* v. *Federal Power Commission* filed in the United States Court of Appeals for the Ninth Circuit because of the importance of the issues involved herein and for reasons (4) through (7) set forth in Paragraph II above of this petition.

WHEREFORE, Petitioner respectfully prays that the Public Utilities Commission of the State of California grant a rehearing of the above entitled matter, order that the effective date of the Order heretofore entered in this matter be extended for the period of the pendency of this petition for rehearing, and order the suspension of the operation of said Order until final determination is had of the Petition entitled *California Electric Power Company* v. *Federal Power Commission*.

Dated at Washington, D. C., this 19th day of July, 1951.

(SEAL)

THE UNITED STATES OF AMERICA
By /s/ PETER CORRADI
Civil Engineer Corps., USN
for Chief of the Bureau of Yards and Docks, Navy Department

ATTEST:
/s/ CHARLES GOODWIN
Counsel
/s/ GEORGE SPIEGEL
Assistant Counsel
Bureau of Yards and Docks
Washington 25, D. C.,
Attorneys for Petitioner

Duly sworn to by Peter Corradi. Jurat omitted in printing.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title omitted)

Points and Authorities in Support of Petition for Review

As its points and authorities, the United States adopts the opinion of the Federal Power Commission (Opinion No. 212) *In the Matter of California Electric Power Co.*, holding that these sales by the Company to the United States was in interstate commerce and the regulation thereof was under the exclusive jurisdiction of the Federal Power Commission and not the Public Service Com-

mission of the State of California. A copy of this opinion is attached and by this reference is made a part hereof.

Respectfully submitted,

JAMES R. BROWNING
James R. Browning,
Acting Assistant Attorney General

(SEAL)

PAUL A. SWEENEY
Paul A. Sweeney,
MELVIN RICHTER
Melvin Richter,
Attorneys, Department of Justice
Attorneys for United States of America.

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Exhibit to Points and Authorities

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION No. 212

In the Matter of
California Electric Power Company } Docket No. E-6269

APPEARANCES

For Respondents
HENRY W. COIL

For Mineral County Power System
L. E. BLAISDELL, *District Attorney*

For Public Utilities Commission of the State of California
BORIS H. LAKUSTA

For the Navy Department
HAMILTON TREADWAY

For Staff of the Federal Power Commission
HOWARD E. WAHRENBROCK
FRANCIS L. HALL

37

Opinion

BY THE COMMISSION:

We initiated this proceeding by our show cause order issued on February 14, 1950, to determine, *inter alia*, whether California

Electric Power Company (Respondent) is in violation of Sections 20, 205 and 206 of the Federal Power Act (Act) and the rules thereunder (1) by increasing its interstate wholesale rate to Mineral County Power System, Mineral County, Nevada (Mineral County) without filing the change in rate as required by the Act and the rules; and (2) by failing to file with us the rate schedule applicable to its interstate wholesale rate to the U. S. Government, represented by the Chief of the Bureau of Yards and Docks, Navy Department (Navy) for supply of energy to the Naval Ammunition Depot at Hawthorne, Nevada.

Respondent is a licensee under Part I of the Act and it has heretofore on several occasions been found to be a public utility under Part II of the Act. However, inasmuch as Respondent asserts that its deliveries and sales to Mineral County and to Navy are not subject to Parts I and II of the Act, we deem it necessary to summarize the pertinent facts pertaining to such deliveries and sales.

Respondent owns and operates an interconnected system in the States of California and Nevada. With the exception of energy received from the Hoover Dam in Nevada, all the energy
38 sold and delivered by Respondent is generated in California.

For our purposes it is only necessary to discuss the operations of Respondent's so-called Northern Division since the energy purchased by Mineral County and the Navy, the only sales in issue in this proceeding, is supplied from that Division. During certain periods of the year all energy sold to Mineral County and Navy is received from the output of Respondent's three licensed projects Nos. 1388 (Poole), 1389 (Rush Creek) and 1390 (Mill Creek), all located in Mono County, California. When the output of these three plants is insufficient to supply the requirements of Mineral County, Navy and Respondent's other loads in Mono County, energy is received from Respondent's Control substation to the south located in Inyo County, California, which is tied into Respondent's Bishop Creek hydroelectric plants, known as Bishop Creek Nos. 2, 3, 4, 5, 6, all of which are licensed projects except No. 6, and from the unlicensed hydroelectric Owens River plants of the City of Los Angeles, known as the Adams Main and the Adams Auxiliary Plant. These Adams plants are tied into Respondent's 110-kv Northern Division transmission line which extends from Control substation to Lee Vining substation, to which the Poole plant (licensed project No. 1388) is also connected. At Lee Vining substation the voltage is reduced to 55-kv and transmitted over Respondent's 55-kv transmission line to its Mill Creek plant (licensed project No. 1390) where the energy sold to Mineral County and the Navy is delivered and metered at Re-
39 spondent's 55-kv switching station bus. During the year

1949, approximately 84.7% of the energy delivered to Mineral County and the Navy originated in Respondent's Rush Creek, Poole and Mill Creek plants. About 10.7% came from the two unlicensed plants of the City of Los Angeles and 4.6% was supplied from the Respondent's five Bishop Creek plants.

At the Mill Creek plant, the Navy owns the oil switch and bus disconnects, for both its and Mineral County's 55-kv transmission lines, together with the control equipment and the oil switch and relays. All other substation equipment, including the meters, is owned, operated and maintained by Respondent. Energy delivered at the Mill Creek substation is transmitted from that point into the State of Nevada for use, distribution and resale, over lines separately owned and operated by Mineral County and the Navy. The latter's 55-mile transmission line, constructed during World War II, is more reliable than the much older line owned and operated by Mineral County. Accordingly, at Hawthorne, switching facilities are available to interconnect Mineral County's system with that of the Navy, so that in emergencies the Mineral County's System can be, and at times it has been, supplied with energy either wheeled from Respondent's Mill Creek plant, via the Navy's line, or from the latter's three-diesel engine driven standby generating plants.

Respondent and its predecessors have been selling electric energy to Mineral County, a county-owned electric utility, since 1936. At the present time Respondent's sale to Mineral County is for Mineral County's requirements in Nevada (except some minor amount of energy supplied by Navy's standby plant during emergencies). The purchased energy, other than line losses and a small amount used in Mineral County's shop and office building, is resold and distributed by Mineral County in Mineral County, Nevada, where it serves the Town of Hawthorne, several small settlements, and a mine and mill load.

On December 5, 1945, Respondent filed with us a contract setting forth the rates and charges for the sale of the above-described electric energy to Mineral County as a rate schedule to supersede Respondent's Rate Schedule FPC No. 13, which had been on file with us since October 20, 1942. The rate schedule filed December 5, 1945, was designated as Respondent's Rate Schedule FPC No. 15, and at Respondent's request, the date of the contract, October 5, 1945, was specified as the effective date of the schedule by our order of February 12, 1946.

On October 15, 1947, Respondent applied to the Public Utilities Commission of California for authority to increase its rates to certain designated customers. On July 1, 1948, the California Commission, in its decision No. 41798 allowed Rate Schedule

41 P-3 covering "Resale Power" to become effective and authorized Respondent in accordance with the terms thereof to increase its rates and charges to the customers named in the application. The rates and charges to Mineral County, however, were not expressly included in the decision of the California Commission. Nevertheless Respondent, being aware that Rate Schedule FPC No. 15 was on file with us as the lawful schedule of rates and charges for the sale of electric energy to Mineral County, on July 30, 1948, notified Mineral County that the new rates authorized by the California Commission would be applied to Mineral County as of October 5, 1948.

On October 15, 1948, Respondent submitted to us for filing the proposed increased rate (Schedule P-3) to supersede the rates contained in its Rate Schedule FPC No. 15. By four letters dated October 7 and December 30, 1948, February 9 and March 18, 1949, we requested Respondent to complete its proposed new filing by submitting the additional data required by the rules, to support its proposed increase in rate. Faced by this necessity, Respondent on March 22, 1949, advised that it had "decided not to go ahead with these filings, and inasmuch as they have never qualified as formal filings, there is no necessity for a cancellation or withdrawal." Upon its request, the incomplete filings were returned to Respondent.

42 By letters dated June 8 and July 20, 1949, we asked Respondent for a reconciliation of its reported revenues from the sale of electric energy to Mineral County for the year 1948 with the rates and charges set forth in Rate Schedule FPC No. 15. By letter dated August 4, 1949, Respondent informed us that since August 1, 1948, service to Mineral County has been billed at a schedule of rates and charges different from those provided in Rate Schedule FPC No. 15. No rate schedule setting forth new rates has been filed with us by Respondent and Rate Schedule FPC No. 15 has never been cancelled in accordance with our rules. Instead, Respondent in August 1949, applied to the California Commission for a finding and declaration that Schedule P-3 is and has been applicable to the sale of electric energy to Mineral County since October 15, 1948, or, if not applicable to establish a rate for such service. Action by the California Commission on this application is now pending.

The record shows that the effect of the use of Rate Schedule P-3 instead of FPC No. 15 during the period from the month ending October 25, 1948, through the month ending February 25, 1950, has increased the amount Mineral County has had to pay by approximately 43% or $15,372.11.

Under an agreement dated July 1, 1943, Respondent supplies the Navy with the energy requirements at the Naval Ammunition

Depot, Hawthorne, Nevada, except such energy as may be generated by the Navy's standby plant (during 1949, Navy's three diesel generators produced 521,500 kwh, equal to 7.5% of the energy purchased by the Navy that year from Respondent). Part of the energy purchased by the Navy is resold by it to
43 domestic and commercial customers located on the U. S. Government Naval reservation. For the period of 1943 to 1948, inclusive, the percentage of energy resold by the Navy (of the total purchased and generated by Navy) ranged from 15.5% to 28.6%, the average being 18.7%. In 1949, approximately 24% of the 6,423,272 kwh purchased and generated by the Navy was resold to the business concessions and residents occupying the Navy's low-cost defense housing project (1,170 units located on the reservation). These customers are individually metered and billed monthly by the Navy in accordance with written contracts at 1.5¢ per kwh. The record shows that such sales have been made with Respondent's knowledge.

This contract which was never filed with us was purported to be terminated by the Respondent as of October 1, 1948. As of that date, Respondent billed the Navy at rates provided in Schedule P-2, "Power-Generated Wholesale Service" filed and published by Respondent with the California Commission pursuant to that Commission's decision No. 41798, referred to above. The Navy has denied the applicability of Schedule P-2 and has refused to pay the rates reflected therein on the grounds, *inter alia,* that Schedule P-2 was not made applicable to the sales of electric energy in Hawthorne, Nevada, by the California Commission and that such sales may not be subject to that Commission's jurisdiction but may be subject to jurisdiction of this Commission. In August 1949, Respondent applied to the California Commission for a finding and declaration that Schedule P-2 is and has
44 been applicable to the sales of electric energy to the Navy since October 1, 1948, or if not applicable to establish a rate for such service. Action by the California Commission on this application as in the case of Mineral County is pending.

This Commission and the California Commission, agreeing that the question of rate jurisdiction presents a situation calling for a concurrent hearing as contemplated by Section 1.37(e) of our rules, adopted orders setting concurrent hearings commencing March 20, 1950, in the hearing room of the California Commission, San Francisco, California.

The Public Service Commission of the State of Nevada, through its Chairman, appeared at the hearing but did not actively participate therein, stating that he was present as an interested party only "due to the fact that these proceedings are to decide whether

the Federal Power Commission or the California Commission has jurisdiction".

JURISDICTION

The facts in this case, former Commission decisions, and court opinions, fully establish that we have jurisdiction under Parts I and/or II of the Act to regulate the rates charged by the Respondent to Mineral County and the Navy. First we shall discuss our jurisdiction over these rates as provided by Part I of the Act.

45 *Jurisdiction under Part I of the Act.*

Under Section 20 of Part I the first prerequisite to our jurisdiction is that the energy must enter into interstate commerce. The facts clearly show that energy generated by Respondent at its licensed projects is transmitted from California to Nevada. The fact that the facilities for the transmission and sale of the energy by Respondent are all located in the State of California and that the facilities used to transmit the energy across the State line are owned by others than the Respondent in no way detracts from its interstate character. It has long been established that a person who transports a product on a portion of an interstate-through journey, even though his portion of the transportation occurs entirely within a state, is engaged in interstate commerce. *The Daniel Ball*, 10 Wall. 557, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83.

Furthermore, the fact that the transmission facilities across the state line are owned and operated by parties who come within the purview of Section 201(f) of the Act in no way affects the entry of Respondent's energy in interstate commerce. *Arizona Edison Company and Central Arizona Light and Power Company*, Opinion No. 190, issued March 31, 1950.

The facts further reveal that both Mineral County and Navy purchase the power "for sale and distribution or use in public service" within the purview of Section 20, Mineral County
46 by virtue of its sales to retail customers in Nevada and the Navy by virtue of its sales to retail customers within the Naval Reservation. Our jurisdiction attaches to every wholesale rate in interstate commerce charged by a licensee, irrespective of who the purchaser may be, subject to one further consideration.

The other aspect of Section 20 which has been brought into issue in this proceeding is whether or not the States of California and Nevada, both of whom the record clearly shows are directly concerned, have provided regulatory commissions to enforce the pro-

visions of Section 20 within such states, and if so, whether such states have been unable to agree on the services to be rendered or on the rates or charges of payment therefor.

First, it should be noted that state authority over an interstate wholesale rate under Section 20 can be exercised only by two or more states jointly. No control over interstate rates and services is granted to a single state. *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 187.

47 Whatever jurisdiction the Nevada Commission may have as to Mineral County's retail rates, it has been given no jurisdiction by Nevada statutes over Respondent's charges to Mineral County. Neither that Commission nor any other properly constituted authority, either under the general statute creating the Public Service Commission of Nevada or under the special statute relative to Mineral County power system, is authorized to regulate the wholesale charges by Mineral County "either within or without the State of Nevada". In other words, even though Mineral County is authorized to purchase energy for resale no regulation of such sales to it is provided by the State.[1]

49 In respect to the sales to the Navy it has not been shown that Nevada has any statutory authority to regulate the rate charged to the Navy by Respondent. In fact Respondent concedes that no such authority exists and accordingly no further discussion is deemed necessary.

The Court made it clear in *Safe Harbor Water Power Corp.* v. *Federal Power Commission* (124 F. 2d at 805-806) that to be a commission or other properly constituted authority of a state within the meaning of Section 20, the state must not only delegate rate regulatory power to an agency, but such agency must in fact exercise the delegated power.

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[1] It is to be noted that Sections 2 and 16 of the Act passed by the Nevada Legislature, as amended on March 5, 1925, authorizing Mineral County to purchase and operate the facilities now utilized by Mineral County, provide in pertinent part (Stat. of Nev. 1925, C. 48, p. 55):

> "Section 2. The board of county commissioners *** shall have authority to enter into any and all necessary contracts with any person, firm or corporation, *either within or without the State of Nevada*, for the purchase of electric energy and current ***.
>
> * * * *
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> "Section 16. The maintenance and operation of said Mineral County power system shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electrical energy and current, *** with the terms and conditions thereof, shall be fixed by said board, subject to the supervision of the Nevada public service commission, who may revise, raise or lower the same. ***"

It is apparent that the Public Service Commission of Nevada is without authority with respect to rates charged Mineral County or the Navy, and therefore cannot be regarded as a "commission or other authority to enforce the requirements of" Section 20, and it follows that no further showing is required to support the conclusion that it is impossible for a properly constituted authority of Nevada to agree with the California Commission concerning the rates charged Mineral County and the Navy.

One other contention advanced by Respondent in regard to our jurisdiction should be noted. This contention is that neither the deliveries to Mineral County nor those to the Navy are subject to our jurisdiction, unless it can be shown that Part II of the Act repealed Sections 19 and 20 of Part I. Inasmuch as Sec-
50 tion 19 applies solely to intrastate rates, it has no applicability in the matter before us, we therefore confine our remarks to Section 20. Heretofore we have considered the matter of repeal of Section 20 by Part II of the Act in detail and again we reaffirm our conclusion of this question *In the Matter of Safe Harbor Water Power Corporation*, 5 F.P.C. 231, 239-243. In this proceeding, as in the *Safe Harbor* case, we conclude that whether Section 20 may be given an interpretation avoiding conflict or (p. 242) "* * * whether the conflicting part of that section be deemed repealed by implication, the finding that the States are unable to agree is not a necessary condition precedent to our authority under that section for the rates here in question, being interstate wholesale rates held beyond the regulatory power of the States in the *Attleboro* case, the condition of section 20 would be inapplicable. Our jurisdiction, therefore, would not be dependent upon our finding that the States are unable to agree."

Jurisdiction Under Part II of the Act.

Now turning to Part II of the Act, Section 201(b) defines the coverage of Part II applicable to "public utilities", and the scope of the Commission's jurisdiction thereunder. It first provides that Part II "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." It then commits to the Commission jurisdiction over "all facilities for such transmission or sale," with certain exceptions inapplicable here. Section 201(c) provides that for the purpose of regulation by the Commission, "elec-
51 tric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof." "Sale * * * at wholesale" is defined in Section 201(d) as sale "to any person for resale."

It has been shown above that the Respondent transmits and sells electric energy at wholesale to Mineral County and to the Navy to

the extent of their requirements in the State of Nevada, except for such energy as may be generated by the Navy's standby plant. Transmission in California, to and including the point of metering at the Mill Creek substation, is effected over facilities of Respondent, such transmission at times covering distances ranging up to eighty miles (from Bishop Creek and City of Los Angeles plants). The energy so transmitted includes energy from both licensed and non-licensed plants. At the Mill Creek plant the facilities of the Respondent join with those of Mineral County and the Navy, thus permitting the energy to continue its uninterrupted journey to the state boundary and thence into the State of Nevada where it is reduced to distribution voltage and, except for the portion thereof devoted by the purchasers to their own use, is resold to ultimate consumers.

We are unable to agree with the contention that we should treat all of the energy sold to the Navy as being *used* by it and therefore not within the concept of "resale" within the meaning of that term as used in Section 201(d) of the Act, in face of the fact that approximately one-fourth of the total of such *use* consists
52 of resales. Section 201(d) defines a wholesale sale as a sale of energy for resale. As previously shown, the undisputed fact is that the energy is in part resold by Navy with Respondent's knowledge, at 1.5¢ per kwh to business concessions and residents occupying the Navy's housing project. There is nothing in the definition of a wholesale sale which makes it necessary that such a sale be under a contract referring to resale. Clearly, then, the sale by the Respondent to the Navy is a sale of electric energy, which is sold for resale, and therefore, a sale at wholesale in interstate commerce squarely within the coverage of the Act.

We have heretofore decided that a sale of electric energy by a municipality is not a municipal use of the energy within the contemplation of Section 10(e) exempting municipal licensees from annual charges "to the extent such power *** is used *** for municipal purposes." *The Central Nebraska Public Power and Irrigation Districts*, 5 F. R. C. 167, 171. Upon a full consideration of this issue, our decision was affirmed by the Court of Appeals for the Eighth Circuit (160 F. 2d 782, 786-787) and *certiorari* was denied by the Supreme Court (332 U. S. 765).

From the description of Respondent's operations, it is apparent that its interstate transmission and wholesale sales of electric energy to Mineral County and to the Navy come squarely within the coverage of Part II of the Act, one of the fundamental purposes of which is to provide for federal regulation in the "gap" revealed by the *Attleboro* decision (*Connecticut Light & Power*
53 *Co.* v. *Federal Power Commission*, 324 U. S. 515, 524; *Jersey Central Power & Light Co.* v. *Federal Power Commission*,

319 U. S. 61, 67-68; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 964, *cert. den.*, 319 U. S. 741).

Respondent's contention that the Commission has no jurisdiction over the rates in question because the facilities used in making the sales to Mineral County and to the Navy are used in local distribution in the State of California, is without merit and has no basis whatsoever in the record. The record discloses that Respondent's facilities utilized in the sale to Mineral County and the Navy are facilities used for the transmission of electric energy in bulk for sale at wholesale. Similar contentions were advanced and found to be without merit by the Court in the case of *Federal Power Commission* v. *East Ohio Gas Co.* (338 U. S. 464, 469-473).

We cannot agree with the contentions of Respondent and counsel for the California Commission that the sales to Mineral County and the Navy are exempt from our jurisdiction because not within the purview of the Act under a literal application of the definitions in Parts I and II. This contention in regard to Mineral County is based upon the theory that the definition of "sale at wholesale" in Section 201(d) of the Act as a "sale to any person for resale" excludes sales to municipalities. We have consistently construed the Act as applicable to interstate wholesale sales to municipalities.

City of Los Angeles, v. *Nevada-California Electric Corp.*,
54 2 F. P. C. 104, 108-109; *In the Matter of Otter Tail Power Company*, 2 F. P. C. 134, 136-139; *In the Matter of Connecticut Light & Power Company*, 3 F. P. C. 132, 144; *In the Matter of Otter Tail Power Company*, Opinion No. 186, November 22, 1949.

The Act if construed literally, might exclude sales to municipalities, but the courts have held that where the plain meaning of words used in a statute produce an unreasonable result, clearly at variance with the policy of the legislation as a whole, the purpose of the statute rather than the literal words must be followed. *United States* v. *American Trucking Associations*, 310 U. S. 534, 543; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 55.

Exemption of sales to municipalities would produce an unreasonable result, for, as we stated in the *Otter Tail* matter (2 F. P. C. 134), it would mean that a utility may not discriminate in rates charged private persons or corporations, but is at complete and unfettered liberty to indulge in the rankest discrimination as between municipalities, or as between private customers and municipalities, receiving the same service. It is hardly likely that Congress intended to deprive consumers served by the thousands of municipally owned distribution systems, of protection from unjust and unreasonable interstate rates. Such result would be completely at variance with the basic purpose of the rate provisions of the Act which were designed to "fill the gap" in rate regulation left by the *Attleboro* case.

55 This analysis and interpretation of the Act equally apply to the sales to the Navy. Furthermore, the rate provisions of Sections 205 and 206 apply to every "public utility", which status depends solely upon the ownership and operation of prescribed facilities. The character of the reseller or its business is immaterial. The word "resale" is used in the Act without qualification. Thus Section 201(d) affords no exemption from our jurisdiction of the sales to Mineral County or the Navy.

Nor do the provisions of Section 201(f) afford an exemption to the Respondent from our jurisdiction over these sales. The Navy and Mineral County may themselves be exempt by the terms of Section 201(f) from "public utility" status under the Act, but the energy transmitted and sold at wholesale to them by Respondent is nevertheless energy "transmitted from a state and consumed at" points "outside thereof" within the literal language of Section 201(c). There is no basis whatever either in the wording, legislative history or purpose of the legislation to imply any exemption to Respondent. Thus it is clear that its sales to Mineral County and the Navy are not exempt by 201(f). The fact that these exempt agencies transmit the energy into Nevada is immaterial.

From a consideration of all matters herein we therefore find that Respondent's sales to Mineral County and the Navy are within the purview and subject to the provisions of Parts I and II of the Act.

56 IMPOSITION OF PENALTIES FOR VIOLATION NOT RECOMMENDED

The record shows Respondent to be in violation of the Act and the rules by its failure to file as a rate schedule its contract with the Navy and by collecting charges from Mineral County which were not on file as a rate schedule, however, we do not find that there are sufficient grounds to justify a finding that Respondent's conduct was "willful and knowingly" so as to warrant reference of the record to the Attorney General of the United States with a recommendation that criminal proceedings be instituted under Section 316 of the Act.

Appropriate findings and order will be entered in accordance with this opinion.

MON C. WALLGREN,
Chairman
THOMAS C. BUCHANAN,
Commissioner
CLAUDE L. DRAPER,
Commissioner
HARRINGTON WIMBERLY,
Commissioner

Dated at Washington, D. C.,
this 12th day of April, 1951.

LEON M. FUQUAY, *Secretary*

Date of Issuance: April 13, 1951

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57 In the Matter of
California Electric Power Company } Docket No. E-6269

SMITH, Commissioner, dissenting:

On this record, in my opinion, the Commission should affirm the Examiner's conclusion that the rates in question are not subject to its jurisdiction under the Federal Power Act.

NELSON LEE SMITH,
Commissioner

April 12, 1951

Date of Issuance: April 13, 1951

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58 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Mon C. Wallgren, Chairman; Thomas C. Buchanan, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

April 12, 1951

In the Matter of
California Electric Power Company } Docket No. E-6269

Order Directing Compliance With the Federal Power Act

Upon consideration of the record in the above-entitled proceeding and the arguments adduced ,and having this day issued its Opinion No. 212 in this matter, which hereby is incorporated by reference and made a part hereof.

The Commission further *finds*:

(1) Respondent, as holder of the licenses issued for the hydroelectric projects designated in the records of the Commission as projects Nos. 344 (San Gorgonia), 1388 (Poole), 1389 (Rush Creek), 1390 (Mill Creek) and 1394 (Bishop Creek), is a license under Part I of the Act.

(2) Respondent is also a "public utility" within the meaning of Part II of the Act (as this Commission has heretofore repeatedly found in the proceedings referred to in the recitals of the Order to Show Cause of February 14, 1950 in this proceeding), not only by virtue of its admitted ownership and operation of jurisdictional facilities not involved in this proceeding, but also because of its ownership and operation of facilities for the transmission and sale of electric energy at wholesale to Mineral County and to the Navy, as hereinafter more fully referred to.

(3) Respondent is engaged in the business of generating, transmitting, selling and distributing electric energy in public service in the States of California and Nevada. In addition to its other sales in California, Respondent supplies the electric requirements of Mineral County, Nevada, through sale of electric energy to Mineral County and to the Navy, such energy being delivered and metered by Respondent at its Mill Creek plant substation.

(4) On December 5, 1945, Respondent filed a contract setting forth rates and charges for the sale of electric energy to Mineral County as a rate schedule to supersede Respondent Rate Schedule FPC No. 13, covering the same transaction, which had been on file with the Commission since October 20, 1943. The rate schedule filed December 5, 1945, was designated by the Commission as Respondent Rate Schedule FPC No. 15, and upon application of Respondent the date of the contract (October 5, 1945) was specified as the effective date of the schedule, by Commission order entered February 12, 1946 (5 F. P. C. 362).

(5) No rate schedule setting forth new rates has been filed with the Commission by Respondent and Rate Schedule FPC No. 15 has never been cancelled in accordance with the Act and the rules. Under said schedule, Respondent is obligated to sell electric energy to Mineral County to the extent of the latter's requirements in Nevada. The purchased energy, other than line losses and a small amount used in Mineral County's shop and office building, is resold and distributed by Mineral County in Mineral County, Nevada, where it serves the Town of Hawthorne, several small settlements, and a mine and mill load.

(6) On July 1, 1943, Respondent entered into an agreement with the Navy for the supply of the Navy's electric energy requirements for use of the Naval Ammunition Depot, Hawthorne, Nevada, except such energy as may be gen-

erated by the Navy's standby plant, and thereafter supplied and billed the Navy for energy pursuant to the terms of that contract until October 1, 1948. Thereafter it continued to deliver energy in the same manner, but to bill the Navy at a higher rate, but the Navy continued to pay for the energy received at the rate provided for in the contract. Part of the energy so purchased by the Navy is resold by the Navy to domestic and commercial customers located on the Naval reservation. For the period from 1943 to 1948, inclusive, the percentage of energy resold by the Navy (to the total purchased from California Electric and generated by the Navy) ranged from 15.4% to 28.6%, the average being 18.7%. In 1949 approximately 24% of the 6,423,272 kwh purchased and generated by the Navy was resold to business concessions and to residents occupying the Navy's low-cost defense housing project located on the reservation. These customers were individually metered and billed monthly by the Navy, in accordance with written contracts, at 1.5 cents per kwh. Such resales have been made with Respondent's knowledge.

(7) To the extent that the output of the three licensed projects (Nos. 1388 (Poole), 1389 (Rush Creek) and 1390 (Mill Creek)) located in Mono County is insufficient to supply the electric requirements of Respondent's loads in Mono County and the Mineral County and Navy loads, such loads are supplied through the transmission in California, by Respondent, of energy over its own facilities, to the Mill Creek substation. The energy so transmitted to that substation is at times comprised solely of energy from licensed projects, at times solely of energy from nonlicensed sources, and at other times, the energy is comprised of a mixture of energy obtained from both licensed and nonlicensed sources. All of the energy so transmitted to the Mill Creek substation originates in the Company's Northern Division, which Division includes not only licensed Projects Nos. 1388 (Poole), 1389 (Rush Creek) and 1390 (Mill Creek) in Mono County, but also the plants and other energy sources, substations and transmission lines referred to in findings (8), (9), (10) and (11) below.

(8) Control Substation, located in Inyo County near Bishop, is the principal substation in that area owned and operated by Respondent. Short tie lines connect that substation with the Company's five Bishop Creek hydroelec-

tric plants. A short distance north of Control Substation, the Company's 100 kv Northern Division tie line is interconnected with the two unlicensed Adams hydroelectric plants of the City of Los Angeles.

61 (9) From Control Substation the 100 kv Northern Division tie line extends northward to the Rush Creek plant (Project No. 1389) in Mono County, thence to LeeVining substation, to which the Poole plant (Project No. 1388) is also connected. At LeeVining substation the voltage is reduced to 55 kv and transmitted over the Company's 55 kv line to the Mill Creek substation where the deliveries are made, without further reduction in voltage, to the Navy and Mineral County.

(10) Transmission facilities used by Respondent in making its deliveries and sales to Mineral County and to the Navy include the 55 kv line in Mono County from LeeVining substation to Mill Creek substation, and the 60-mile 100 kv Northern Division tie line from Control Substation.

(11) At the Company's Mill Creek substation, the Navy owns the oil switches and bus disconnects to both the Navy and Mineral County transmission lines, together with the control equipment for the oil switches and relays. All other substation equipment at Mill Creek, including the meters, is owned, operated and maintained by Respondent.

(12) By means of the facilities referred to in finding (11) above, the facilities of Respondent interconnect with those of Mineral County and the Navy at the Mill Creek substation. From that point of delivery separately owned and operated 55 kv lines of Mineral County and the Navy transmit the energy to the state boundary and thence into the State of Nevada where it is reduced to distribution voltage and, as indicated above, except for the portion thereof devoted by the purchasers to their own use, is resold to ultimate consumers and consumed in Nevada.

(13) The sale of electric energy by Respondent to Mineral County, above referred to, is a sale at wholesale in interstate commerce subject to the jurisdiction of this Commission under the provisions of Section 201(b) of the Act. The Sale to the Navy is a sale of electric energy, a substantial, non-identifiable and non-segregable part of which is sold for resale, and the sale to the Navy is, therefore, also a sale at wholesale in interstate commerce. The sales
62 to Mineral County and to the Navy are not exempt from

this Commission's jurisdiction by Section 201(f) of the Act. Each rate and charge made, demanded or received by Respondent for or in connection with each such sale is subject to the rate regulatory and filing provisions of Sections 205 and 206 of Part II of the Act and Part 35 of the Commission's rules.

(14) The electric power from Respondent's licensed projects sold to Mineral County and to the Navy is sold in and enters interstate commerce, within the meaning of Section 20, Part I of the Act.

(15) The "States directly concerned" within the meaning of Section 20 are the States of California and Nevada. The State of Nevada has not provided a regulatory commission or other authority to enforce the requirements of Section 20 with respect to such sales as those made by Respondent to Mineral County and to the Navy.

(16) Respondent's rates and charges for electric energy sold to Mineral County and to the Navy are subject to regulation in accordance with the provisions of Section 20.

(17) The facilities used by Respondent in making its wholesale sales of electric energy to Mineral County and to the Navy are not "used in local distribution" within the meaning of Section 201(b) of the Act.

(18) Since the effective date of Rate Schedule FPC No. 15, i.e., October 5, 1945, such schedule has been the lawful rate applicable to sales of electric energy by Respondent to Mineral County, and such schedule will continue to be the lawful rate for such service until superseded by a properly supported new filing or by Commission order.

(19) Since October 5, 1948, Respondent has charged and continues to charge Mineral County rates in excess of those provided in Rate Schedule FPC No. 15, and thereby has violated and threatens to continue violating the provisions of Sections 20 and 205(d) of the Act and Sections 35.3 and 35.20 of the Commission's rules thereunder.

63 (20) It is reasonable and appropriate for this Commission to order Respondent to cease and desist from charging Mineral County any rate other than those duly filed pursuant to Section 205 of the Act and the provisions of Part 35 of the Commission's rules.

(21) It is reasonable and appropriate for the purposes of the Federal Power Act to require Respondent to (a) account

for the difference between the amounts which were actually charged and paid for energy delivered to Mineral County and those which would have been properly charged in accordance with Rate Schedule FPC No. 15, (b) to set up out of surplus, in Account 258, Other Reserves, a special contingency reserve in the amount of that difference, and (c) to submit a plan for the disposition of that amount to those entitled thereto.

(22) By its failure to file its agreement of July 1, 1943, with the Navy, Respondent has violated and threatens to continue violating the provisions of Section 205 of the Federal Power Act and Part 35 of the Commission's rules.

(23) It is reasonable and appropriate that, in accordance with the Act and the rules thereunder, Respondent be required to file the rates and charges as set forth in the agreement of July 1, 1943, referred to in finding (22), above, as a rate schedule, such schedule to be effective until and unless superseded by a new filing or Commission order.

(24) It is reasonable and appropriate for this Commission to order Respondent to cease and desist from charging the Navy any rate other than that duly filed with this Commission.

(25) The ruling of the Hearing Examiner as set forth in line 10, page 112, to line 6, page 115, of the transcript of the hearing sustaining the objection of counsel for Respondent to the receipt in evidence of the Nevada Public Service Commission's letter of July 14, 1949, which appears in the transcript, was in error, and the letter was properly admissible.

(26) The ruling of the Hearing Examiner as set forth in line 13, page 115 to line 3, page 122 of the transcript, excluding testimony which appears as an offer of proof was properly admissible.

The Commission *orders*:

(A) California Electric Power Company cease and desist from charging Mineral County Power System any rates and 64 charges other than those reflected in filed Rate Schedule FPC No. 15, until and unless such schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order.

(B) California Electric Power Company account for the difference between the amounts actually charged and paid

by the Mineral County Power System and those which would have been properly charged in accordance with Rate Schedule FPC No. 15; set up out of surplus, in Account 258, Other Reserves, a special contingency reserve in the amount of that difference; and submit a plan with respect to the disposition of that amount to those entitled thereto.

(C) California Electric Power Company file the rates and charges as set forth in its agreement introduced in evidence as Exhibit No. 1, dated July 1, 1943, with the United States of America, represented by the Chief of the Bureau of Yards and Docks, Navy Department, as a rate schedule for service to the Navy, such schedule to be effective until and unless schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order.

(D) California Electric Power Company cease and desist from charging the Navy any rate other than that duly filed with the Commission.

(E) The ruling of the Hearing Examiner as set forth in line 10, page 112, to line 6, page 115, of the transcript of the hearing sustaining the objection of counsel for California Electric Power Company to the receipt in evidence of the Nevada Public Service Commission's letter of July 14, 1949, which appears in the transcript, be and the same is hereby reversed.

(F) The ruling of the Hearing Examiner as set forth in line 13, page 115 to line 3, page 122 of the transcript, excluding testimony which appears as an offer of proof, be and the same is hereby reversed.

By the Commission. Commissioner Smith dissenting.

LEON M. FUQUAY,
Secretary.

Date of Issuance: April 13, 1951

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70 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title Omitted)

Answer to Petition for Writ of Review—Filed Oct. 8, 1951

The Public Utilities Commission herewith respectfully submits its answer to the two petitions for writ of review herein. Each

challenges the Commission's Decision No. 45913, issued July 3, 1951. (The decision is appended as Exhibit A to the petition for a writ filed by the United States.) While the grounds
71 alleged in the two petitions correspond only in part and while there are substantial factual differences relating to each petitioner which had to be given effect by the Commission in issuing its decision, the same basic argument dominates both petitions, viz., that the California Commission was without authority to render the decision it did, being precluded by the interstate commerce clause (Federal Const., Art. 1, Sec. 8) and the Federal Power Act (1935, c. 687, 49 Stat. 841, 16 U.S.C.A. Sec. 791, et seq.) This circumstance suggests the appropriateness of a single document in answer to both petitions. It appears that needless repetition can thereby be avoided and the pattern of the Commission's reasoning more clearly set forth. The Court's acceptance of a single answer is, therefore, respectfully sought.

Quite simply the decision under attack did two things: (1) it *authorized* California Electric Power Company to charge certain electric rates to the Navy Department for sales at Mill Creek, California, the energy to be transported by the Navy from Mill Creek to Nevada for use of the Naval Ammunition Depot at Hawthorne; (2) it *directed* California Electric Power Company to charge certain electric rates to Mineral County Power System (the operating name for the County of Mineral, Nevada, in its proprietary capacity as the seller of electric energy at retail) for sales at Mill Creek, California, the energy to be transported by
72 Mineral County Power System from Mill Creek to Nevada for resale to retail customers in that state. The reason for *authorizing* rather than directing the imposition of rates in the case of the Navy lay in the fact that, pursuant to Public Utilities Act, Section 17(b) (now Public Utilities Code, Section 532), the Commission had, in 1942, issued a general order (General Order No. 96), providing in Section X-B thereof that an electric utility could, if it saw fit, furnish service to the United States and its departments at "free or reduced rates." Mineral County, on the other hand, does not come within the terms of such General Order.

The Commission's decision, authorizing rates in the case of the Navy and directing rates in the case of Mineral County Power System, was the result of two applications filed with the Commission by California Electric Power Company seeking to have the Commission determine whether an earlier general rate increase decision (Decision No. 41798 of July 1, 1948) should be construed to apply to the two types of sales in question. During the pendency of such applications, and after the first day's hearing thereon, it became apparent that the jurisdiction of the California Commission to make rate orders respecting the sales referred to

hinged upon the proper interpretation of both the interstate commerce clause and the Federal Power Act. It was at that juncture
73 that the Federal Power Commission, having learned of the California Commission proceeding, decided to institute its own proceeding to inquire into the matter. In implementation thereof it issued an order to show cause against California Electric Power Company (FPC Docket No. 3-6269). By mutual agreement of the California and Federal commissions, a concurrent hearing was thereafter held in San Francisco. The effect of such procedure was to make the evidence adduced during the concurrent hearing equally a part of the record in each of the two proceedings. The Legal Department of the California Commission entered an appearance at such concurrent hearing and argued by subsequent briefs that jurisdiction over the rates in question lay solely in the California Commission.

While the Federal Commission proceeding was instituted later than the California Commission proceeding, the Federal Commission was the first to issue an opinion. (FPC Opinion No. 212, issued April 13, 1951). Such opinion, contrary to the Federal Examiner's proposals, asserted jurisdiction in the federal body, Commissioner Smith dissenting. A petition to have such Federal Commission order set aside was filed on June 21, 1951, by California Electric Power Company in the United States Court of Appeals for the Ninth Circuit. (U. S. Ct. of Apps., 9th Circuit, Docket No. 12987.) That review proceeding is now pending and
74 the California Commission will seek permission at the appropriate time to file an amicus curiae brief therein. On July 3, 1951, the California Commission issued its own decision, Decision No. 45913, holding that neither the interstate commerce clause nor the Federal Power Act precluded California Commission jurisdiction. It further held that its earlier general rate increase decision affecting California Electric Power Company (Decision No. 41798) should be construed to apply to the sales in question. Accordingly, it issued its order authorizing certain rates to be charged to the Navy and directing certain rates to the charged to Mineral County, as mentioned above. That is the decision here assailed by the United States (Navy Department) and Mineral County, Nevada.

It is conceded that petitioners have perfected their right to seek review here by exhausting the administrative remedy. Both filed petitions for rehearing which were denied. Public Utilities Act, Section 67 (now Public Utilities Code, Section 1756; Stats. 1951, ch. 764). It is further conceded that they are entitled to urge the several grounds presented by them to this Court because such grounds were urged in their respective petitions for rehearing.

Public Utilities Act, Section 66 (now Public Utilities Code, Section 1732, Stats. 1951, ch. 764).

The grounds for review urged before this Court by the
75 United States (Navy Department) are as follows:

1. It was error for the California Commission to hold that the sales to the Navy are not in interstate commerce.

2. It was error for the California Commission to hold that the sales to the Navy even if held to be in interstate commerce are subject to the California Commission's jurisdiction.

3. It was error to issue a decision in square conflict with the Federal Power Commission's order in a proceeding in which the Legal Department of the Public Utilities Commission participated as a party and in which review proceedings are pending before the Court of Appeals for the Ninth Circuit.

4. It was error to construe the Commission's earlier general rate increase decision (Decision No. 41798 of July 1, 1948) as covering the sales by California Electric Power Company to the Navy and as authorizing the application of the company's Schedule P-2.

Mineral County urges the following grounds for review:

1. The California Commission acted in excess of its powers and jurisdiction.

2. It was error to issue a decision in square conflict with the Federal Power Commission's opinion.

3. The California Commission did not take cognizance of a certain provision in the Nevada laws.

4. The California Commission misconstrued Section 201(f) of the Federal Power Act.

An examination of the several grounds listed reveals one manifest misstatement on the part of each petitioner. The United States, in alleging in its Ground No. 1 that the California Commission erred in construing the sales to the Navy as not in interstate commerce, accuses the California Commission of a posi-
76 tion it has not taken. Nowhere in the decision does the California Commission express an opinion that the sales in question are or are not in interstate commerce. Mineral County in its Ground No. 4 accuses the Commission of relying upon Section 201(f) of the Federal Power Act to exempt the sales in question. Nowhere in the decision does the California Commission rely upon such section or so much as mention it.

It follows that Ground No. 1 in the United States petition and Ground No. 4 in Mineral County's petition may be excluded from consideration. The remaining grounds will be dealt with in the argument which follows. It will be noted, as previously mentioned, that both petitioners challenge the jurisdiction of the California Commission to make the order it did. Furthermore, both petitioners allege that it was error for the California Commission to issue a decision in conflict with an opinion of the Federal Power Commission. The United States makes an additional contention, not shared in by Mineral County, to the effect that the California Commission misconstrued its own earlier rate decision. On the other hand, Mineral County makes an additional contention, not shared in by the United States, to the effect that the California Commission did not take full cognizance of certain provisions in the Nevada law.

We are convinced that the several contentions of the petitioners are without merit. It will be the purpose of the following argument to present to this Court the cogent reasons dictating such conclusion.

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Argument.

I. *Sales to the Navy. The California Public Utilities Commission Is Not Precluded from Exercising Jurisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to the Navy, Either Under the Interstate Commerce Clause or the Federal Power Act.*

A. *Facts.*

California Electric Power Company began selling electric energy to the Navy at Mill Creek, California, in 1943 pursuant to a contract for the sale of all energy required by the government "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada." The energy is delivered to the Navy by the Company at the latter's Mill Creek generating plant. The Navy transmits such energy over a Navy-owned transmission line extending from the Mill Creek plant to the Naval Ammunition Depot at Hawthorne, Nevada. Thus, part of the transmission line is in California and part in Nevada. A large percentage of the energy furnished to the Navy is derived from hydroelectric plants operated by the Company pursuant to license as provided in Part I of the Federal Power Act. The balance is derived by the Company from non-licensed sources in California. While over a long range period the greater part of the energy furnished to the Navy comes from licensed projects, there are moments when all or a portion of its comes from the non-licensed sources. The energy purchased by the Navy is consumed wholly at the Naval

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Ammunition Depot at Hawthorne, Nevada, which, in addition to the installations devoted directly to Naval use, includes the quarters for Naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provides living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation. The Navy makes a charge for electric energy furnished to those individuals residing in the "public quarters" or occupying premises for living or business purposes at Babbitt. Those who occupy living space in the "public quarters" and in Babbitt are tenants of the Navy and their lease agreements provide that the rental privilege ceases upon termination of employment by the Navy. Those who conduct business concessions at Babbitt are also tenants of the Navy and they occupy premises pursuant to a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot." The electric energy furnished these tenants in the "public quarters" and at Babbitt comes mainly from the supply purchased by the Navy at Mill
79 Creek though, on occasion, it comes from the Navy's own stand-by plants on the reservation.

It is believed the foregoing facts are not in dispute. It will be noted that they immediately raise certain basic problems:

1. Since the energy crosses a state line, is the sale by California Electric to the Navy in interstate commerce? If so, does the interstate commerce clause of the Federal Constitution preclude state jurisdiction, in the absence of federal statute? This latter question is of significance because it is arguable that, even if the sales be conceded to be in interstate commerce, the Federal Power Act does not apply to that part of the energy derived from non-licensed sources. Part I of that Act sets forth provisions applicable to "licensees" licensed under such Part, and it is arguable that California Electric is a "licensee" within the meaning of Part I only to the extent that it sells power from licensed projects. Part II of the Act, while possibly applying to electric sales regardless of whether the energy comes from licensed or non-licensed sources, regulates only sales for resale in interstate commerce, and we contend that Part II does not apply because the sales to the Navy are not for resale.

2. To what extent does the Federal Power Act apply? Since California Electric is a "licensee" under Part I, does that Part govern all sales by the Company, whether the energy is
80 derived from licensed or non-licensed sources? If the sales in question be construed to be sales for resale in interstate commerce, does Part II apply and, if so, should the language there-

in be construed to permit state jurisdiction? It will be the purpose of the discussion below to demonstrate that neither Part I nor Part II of the Federal Power Act presents any barrier to the exercise of jurisdiction over the sales to the Navy as undertaken by the California Commission. Such conclusion is reached whether it be assumed that Parts I and II of the Federal Power Act both apply or that only Part I or Part II applies. In this connection, the attention of the Court is respectfully referred to the following decisions which shed some light upon the complexity of the problem:

Safe Harbor Water Power Corp. v. *FPC* (CCA, 3d, 1941), 124 F.2d 800, cert. dnd. (1942), 316 U.S. 663, 86 L.ed. 1748.

Safe Harbor Water Power Corp. v. *FPC* (CA, 3d, 1949), 179 F.2d 179, cert. dnd. (1950), 339 U.S. 957, 94 L.ed. 1368.

Consideration of the interstate commerce clause and the Federal Power Act follows:

B. *The Interstate Commerce Clause Does Not Preclude Jurisdiction by the California Public Utilities Commission.*

Upon the facts as stated, the interstate commerce clause does not, we submit, preclude jurisdiction by the California Public Utilities Commisison over the rates charged by California
81 Electric Power Company to the Navy. In *Public Utilities Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U.S. 83, 71 L.ed. 549, P.U.R. 1927B 348, it was held in a case where no federal statute delineating state and federal jurisdiction was involved,[1] that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as the interstate business carried on between the two utilities is essentially national in character, and state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free. Even if it be assumed that the sales by California Electric Power Company to the Navy are in interstate commerce, regulation of the rates for such sales by the State of California is not precluded under the *Attleboro* case. That deci-

[1] The Federal Water Power Act (1920, c. 285, 41 Stat. 1063, later incorporated as Part I of the Federal Power Act, 16 U.S.C.A., Sec. 792, et seq.) was in effect at the time of the *Attleboro* decision but was not applicable because the electric power in question was not derived from projects licensed by the federal government.

sion was based upon the proposition that the interstate commerce clause forbids state jurisdiction where a potential clash of state interests would arise from its exercise. Here, there can be no potential clash of state interests. Only one state, viz., California, is directly concerned, since Nevada has no jurisdiction over
82 the Navy, either as to the rates the Navy pays to California Electric or as to the rates the Navy charges its tenants. California's right to exercise jurisdiction arises only because it may regulate the rates of the seller California Electric, a California public utility. The purchaser of the energy, the Navy, is exempt from state jurisdiction. It is a department of the federal government; furthermore, it is not a public utility.

Another circumstance in support of the proposition that the interstate commerce clause does not preclude California jurisdiction is that the electric rates authorized by the California Commission are not rates which California Electric *must* charge the Navy. As stated heretofore, the Company is free, pursuant to Section 17 of the Public Utilities Act, as implemented by the Commission's General Order No. 96, to furnish electric service "at free or reduced rates" to a department of the United States Government.

The foregoing considerations make fairly plain that the California Commission's rate decision respecting sales to the Navy is not vulnerable as imposing an undue burden upon interstate commerce in violation of the Federal Constitution.

C. *The Federal Power Act Does Not Preclude Jurisdiction by the California Public Utilities Commission.*

As indicated previously, this conclusion is reached whether
83 it be assumed that both Part I of the Federal Power Act (setting forth the provisions applicable where power from licensed projects is involved) and Part II (applying "to the sale of electric energy at wholesale in interstate commerce but . . . not . . . to any other sale") apply, or that either Part I or Part II applies.

1. *The Effect of Part I of the Federal Power Act.*

Turning first to Part I (derived from the Federal Water Power Act (1920, ch. 285, 41 Stat. 1063)), if it be assumed that the sales to the Navy are in interstate commerce, the applicable language is found in Section 20 providing, in so far as pertinent, that when:

> "said power or any part thereof [presumably any power furnished by a licensee] shall enter into interstate or foreign commerce the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association pur-

chasing power from such licensee for sale and distribution or use in public service shall be reasonable . . . to the customer . . . ; and whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their properly constituted authorities on the services . . . or . . . rates . . . jurisdiction is hereby conferred upon the [Federal] Commission . . . to regulate . . . so much of the services . . . and . . . rates . . . there for as constitute interstate or foreign commerce . . . "

It will be observed that Congress has conferred jurisdiction
84 on the Federal Power Commission under Section 20 only if any of the states directly concerned has not provided a commission or other authority to enforce the requirements of Section 20 within such state ("requirements" apparently referring to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable), and, furthermore, even though the requisite state commissions or other authorities have been provided, only if the states directly concerned are unable to agree on the service or rates through their properly constituted authorities.

Assuming that the language of Section 20 applies at all, it is clear, we submit, that under it, the sales to the Navy are excluded from Federal Power Commission jurisdiction. The California Commission is the kind of state "commission or other authority" contemplated by Section 20, for it has comprehensive power to regulate electric utility rates and service "within such state," viz., California. It has already been pointed out, in considering the interstate commerce clause, that California is the only state which can, because of its authority over California Electric, affect the sales to the Navy. Nevada cannot order the Navy to pay a certain rate for electricity purchased, nor can it order the Navy to charge a certain rate for electricity distributed. It follows that, since only one state is "directly concerned," no question can arise
85 of inability as between two states directly concerned to agree on the reasonableness of the rates charged to the Navy. Thus, Federal Power Commission jurisdiction is excluded because the two conditions to its exercise, as prescribed by Congress in Section 20, are absent.

2. *The Effect of Part II of the Federal Power Act.*

Part II of the Federal Power Act (enacted as part of the Public Utility Act of 1935, ch. 687, 49 Stat. 803) declares in Section 201 (b) that:

"The provisions of this Part shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . . "

In addition to this jurisdictional language, it is provided in the policy declaration of Section 201(a) that federal regulation of the "sale of such [electric] energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those matters which are not subject to regulation by the states."

Putting aside the question whether the sales are in interstate commerce, it is clear that the sales to the Navy do not fall within the language "sale of electric energy at wholesale," which is defined by Section 201(d) to mean "a sale of electric energy to any person for resale." The sales in question are neither sales to a "person" nor are they sales "for resale."

86 The word "person" is defined by Section 3(4) of the Act to mean "an individual or corporation." A "corporation" by Section 3(3) means:

"any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' . . . "

It is obvious that the Navy is not a "person" as defined.

Not only is the Navy not a "person" but the sales to it cannot properly be described as "sales for resale." Reference has already been made to the contract entered into in 1943 whereby California Electric agreed to supply "all electric energy required by the Government . . . for use of the Government's Ammunition Depot . . . " The evidence showed that the use in fact made of the energy furnished is consistent with such language. All of the energy is consumed on the Naval reservation; part is used in the Depot's industrial operations or dissipated in system losses; the balance is used by the individuals and business establishments located on the government reservation. Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege

87 ceases upon termination of employment. For the business concessions, the government issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot."

It follows that the sales to the Navy are in effect for its sole use and not "for resale." It is true that, in supplying electricity to those living or conducting business at the reservation, the Navy is in a sense "reselling" energy purchased from California Electric Power Company, but it is clear that the term "sale for resale" in Part II of the Federal Power Act was intended by Congress to refer to a different situation. The courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision. See *Jersey Central Power & Light Co.* v. *FPC* (1943), 319 U. S. 61, 87 L. ed. 1253, 63 S. Ct. 953. The Navy is certainly not a public utility. Even assuming that it would not be precluded from that status by virtue of its position in the federal government, it could not be deemed a public utility by virtue of furnishing electricity to tenants whose continued tenancy depends upon the needs of the Navy landlord.

Quite aside from the conclusion thus reached, that the sales to the Navy are not to a "person for resale" under Part II of the Federal Power Act, jurisdiction is denied the Federal Power Commission by the proviso clauses of Sections 201(a) and 201(b) of Part II. Section 201(a) declares that federal regulation shall

"extend only to those matters which are not subject to regu-
88 lation by the States" and Section 201(b), in making Part II applicable to "sales at wholesale in interstate commerce," contains the proviso that Part II "shall not apply to any other sale of electric energy." Taking these sections together and construing them in the light of their statutory history, it is plain that Congress intended the Federal Power Commission to have jurisdiction only in that area where the United States Supreme Court had declared state regulation over sales could not be exercised because of the interstate commerce clause. See *Connecticut Light and Power Co.* v. *FPC* (1945), 324 U. S. 515, 89 L. ed. 1150, 65 S. Ct. 749. In the case presented here, it has already been pointed out that the interstate commerce clause does not apply to prevent state jurisdiction, and it has further been pointed out that the machinery set up by Congress in Section 20 of Part I to enable states upon certain conditions to exercise jurisdiction without burdening interstate commerce is available upon the facts shown and makes it possible for California to regulate the sales to the Navy. Thus, both under the Constitution and Part I of the Federal Power Act, California may exercise jurisdiction. Therefore, the provisos of Sections 201(a) and 201(b) in Part II operate to deny Federal Power Commission jurisdiction under Part II. It follows that

there is nothing in Part II to prevent the exercise of Cali-
89 fornia jurisdiction over the sales in question.

II. *Sales to Mineral County Power System. The California Public Utilities Commission May Properly Exercise Judisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to Mineral County Power System. The Right to Exercise Such Jurisdiction Is Assured by the Terms of the Federal Power Act.*

A. *Facts.*

As previously noted, California Electric sells electric energy to Mineral County Power System at Mill Creek, California, and the latter transmits the energy over its own line to Nevada, reselling to local consumers in Nevada. As in the case of the Navy, the evidence indicates that, while a large percentage of the energy is derived from licensed projects, there are times when all or a portion of it comes from non-licensed sources.

B. *The Right of the California Public Utilities Commission to Exercise Jurisdiction Is Assured by the Terms of the Federal Power Act.*

Upon such facts, it is submitted that the right of the California Public Utilities Commission to exercise jurisdiction, even if the sales by California Electric be considered to be in interstate commerce, is effectively provided by the terms of the Federal Power Act. It is true that, unlike the situation with respect to sales to the Navy, regulation by California of the sales to Mineral County Power System might well, standing alone, be regarded as imposing an undue burden upon interstate commerce, for the State
90 of Nevada clearly has an interest in the cost of electricity to Mineral County Power System and the rates in turn charged by it to its customers. It is in this precise kind of situation, however, that the Federal Power Act, through the machinery set up in Part I, Section 20, makes possible the exercise of state jurisdiction under certain conditions where such exercise would not impose an undue burden on interstate commerce by jeopardizing the interests of a sister state.

It is submitted that Part II of the Federal Power Act does not apply because the sales to Mineral County Power System are not to a "person" as defined. Even if Part II were construed to apply, however, the proviso clauses previously alluded to, in Sections 201(a) and 201(b) of Part II, operate to preserve the exercise of jurisdiction recognized in Part I.

Detailed consideration of the effect of Parts I and II of the Federal Power Act upon the exercise of California Commission jurisdiction over the sales to Mineral County Power System follows:

1. *The Effect of Part I of the Federal Power Act.*

By the terms of Part I, Section 20, two conditions must be present before states directly concerned may exercise jurisdiction: (1) such states must have commissions with authority to enforce the requirements of Section 20 within the state; (2) such states must not be unable to agree upon the rates to be charged. In the case of the sales to Mineral County Power System, (1) each
91 of the states directly concerned, viz., California and Nevada, *has* provided "a commission or other authority to enforce the requirements of this section within such state," and (2) such states *have not*, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question.

Considering more specifically the first of these two conditions provided in Section 20, it cannot be seriously contended that the California Commission, entrusted as it is with very broad regulatory authority over the rates and service of utilities within the state, fails to qualify as "a commission or other authority to enforce the requirements of this section within such state." While the Nevada Public Service Commission does not exercise as great a degree of control over Mineral County Power System as it does over private organizations engaged in public service in Nevada, it nevertheless has express jurisdiction over Mineral County Power System's rates. Nevada Statutes of 1925 provide at page 55:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commission, who*
> 92 *may revise, raise or lower the same.*" (Emphasis added.)

The quotation makes clear that the Nevada Public Service Commission is, with respect to Mineral County Power System's rates, "a commission or other authority to enforce the requirements of this section within such state."

The petitioners contend that, in order to qualify as "a commission or other authority to enforce the requirements of this section within such state," a commission must have authority not only to regulate the rates charged by a utility but the rates such utility pays for power purchased ouside the state and transmitted in interstate commerce. It is claimed that the Nevada Commission does not qualify because it is not empowered to fix the rates Mineral County Power System pays to California Electric Power Company. Such contention has no merit. Surely, Congress did not

contemplate state commissions with powers beyond those normally entrusted to them, powers which might indeed be found to be unconstitutional.

Turning to the second condition in Section 20, viz., that the states must not be unable to agree, there was no evidence whatever to indicate that California and Nevada "through their properly constituted authorities" were "unable to agree." No evidence whatever was offered respecting any course of dealing, or an absence thereof, between the California and Nevada commissions, or between any other authorities of the respective states. The
93 Chairman of the Nevada Public Service Commission stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He further stated:

> "The State of Nevada, therefore, is not interested except to the extent that the users are living in Nevada and, therefore, I will say that we are very much interested. I am not prepared to state at this time what the position of our Commission would be, until after this matter of jurisdiction has been decided. That is all the statement I wish to make."

These words make apparent that there was no inability to agree, and that the Nevada Commission has adopted a neutral position.

It follows that, since neither of the circumstances prevailed upon which Federal Power Commission jurisdiction is conditioned under Section 20, jurisdiction could properly be exercised by the California Commission over the sales to Mineral County Power System.

See First and Second *Safe Harbor* cases, supra.

2. *The Effect of Part II of the Federal Power Act.*

It was observed in discussing the sales to the Navy that Part II gives the Federal Power Commission jurisdiction only over sales . . . "to any person for resale." The sales to Mineral County
94 Power System undoubtedly are "for resale" but they are not sales to a "person." Section 3(4) defines a "person" as "an individual or corporation." A "corporation" by Section 3(3) "shall not include 'municipalities' as herein defined." A "municipality" by Section 3(7) means "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power . . ." Mineral County Power System, as we understand it, is the operating name for the County of Mineral in its proprietary capacity as the seller of electric energy at retail. Thus, it is a

"municipality" as defined in Section 3(7) and, therefore, is excluded from the definition of a "corporation" in Section 3(3) and from the definition of a "person" in Section 3(4). It follows that Part II does not apply to the sales to Mineral County Power System.

Even if the sales to Mineral County Power System were to be regarded to be within the purview of Part II, the proviso clauses of Sections 201(a) and 201(b) apply. The views heretofore stated respecting them apply with equal force. Since by the provisions of Part I, Section 20, the California Commission upon the facts may exercise jurisdiction, the proviso clauses in Part II operate to ensure that jurisdiction by denying it to the Federal Power Commission.

95 We have developed at some length the reasoning underlying the California Commission's conclusion that it had jurisdiction to regulate the rates for the sales to the Navy and Mineral County Power System. We turn now to the second contention made by both petitioners, viz., that it was error to issue a decision in square conflict with the Federal Power Commission's opinion.

III. *The California Public Utilities Commission Was Not Precluded from Rendering a Decision Based Upon Its Own Interpretation of the Federal Constitution and a Federal Statute Merely Because a Federal Power Commission Decision Taking a Contrary Position Was Currently Before a Federal Court of Appeals on Petition for Review.*

Petitioners do no more than make the flat assertion that it was error for the California Commission to issue a decision in conflict with a Federal Power Commission decision currently under review. No reason is assigned for such position and no authorities are cited.

If petitioners means to indicate that, where the construction of the Federal Constitution or a federal statute is in issue, a state tribunal must defer to a federal tribunal whenever a proceeding has been begun in the latter, they forget that the laws of the United States are as binding on citizens and courts as state laws.

96 State tribunals have equal jurisdiction with federal tribunals to construe federal law and determine whether that law confers concurrent jurisdiction or exclusive jurisdiction upon one or the other of such tribunals. *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119. In *Grubb* v. *Public Utilities Commission of Ohio* (1930), 281 U. S. 470, 74 L. ed. 972, the United States Supreme Court said:

> "The appellant relies on the commerce clause as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation . . . and is in conflict with the doctrine often sustained by this court that the states have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law confers jurisdiction.

Grubb v. *Public Utilities Commission of Ohio* (1930); supra.
Minneapolis & St. L. R. R. v. *Bombolis* (1916), 241 U. S. 211, 60 L. ed. 961.
Robb v. *Connolly* (1884), 111 U. S. 624, 28 L. ed. 542.

97 The state court may not decline to exercise jurisdiction merely because it would be inconvenient or confusing to handle a case involving rights under a federal statute.

Gerry of California v. *Superior Court*, supra.
Mondou v. *New York, New Haven & Hartford R. R.* (1912), 223 U. S. 1, 56 L. ed. 327.

In the *Gerry of California* case, *this Court said* (32 Cal. 2d 119 at 122):

> "Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The state and federal tribunals may proceed until a final judgment of one becomes conclusive on the other as *res adjudicata*.

Grubb v. *Public Utilities Commission*, supra.

In short, petitioners' contention is without merit.

IV *The California Commission Was Fully Warranted in Concluding That Its Earlier Rate Decision, Decision No. 41798, Should Be Construed to Apply to the Sales by California Electric Power Company to the Navy.*

The United States contends that it was error for the California Commission to construe its earlier Decision No. 41798 as applying to the sales to the Navy. Such contention to be meritorious
98 would have to be based upon the premise that there was no evidence in the record in the earlier proceeding and no statement in the earlier decision itself which could reasonably form the basis for concluding that the sales to the Navy were intended to be covered in the rate order. Quite aside from the fact that the Commission is in the best position to know what it intended in issuing the earlier rate order, there was clearly ample evidence in the earlier proceeding to justify a rate order extending to the sales to the Navy, and, furthermore, the language of that earlier decision is reasonably susceptible of the interpretation given it. The Court's attention is respectfully invited to the discussion of this matter beginning at the bottom of sheet 3 of Decision No. 45913 (the decision here under attack).

V. *The Charge That the California Commission Did Not Give Full Recognition or Effect to the Nevada Statutes Is Unwarranted.*

Mineral County in its petition for a writ incorporates by reference its petition for rehearing, on page 2 of which it is contended that the California Commission did not give effect to the following language in the Nevada statutes:

> "Section 2. The board of county commissioners . . . shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either within or without the State of Nevada, for the purchase of electric energy or current . . ."

99 Mineral County contends that such language excludes the Nevada Public Service Commission from exercising jurisdiction over Mineral County Power System notwithstanding the language in Section 16, page 55 of Nevada Statutes of 1925 giving that Commission jurisdiction over the rates charged by the Power System. (See quotation from Nevada Statutes, page 22 above.) We are at a loss to follow the thread of petitioner's reasoning. It appears to be a *non sequitur*.

CONCLUSION

It is respectfully submitted that neither the United States nor Mineral County, Nevada, has shown cause for the issuance of a writ herein. Their petitions should, therefore, be denied.

It is submitted that this Court should, for the reasons previously given, act upon the petitions herein without awaiting disposition of the proceeding before the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

s/ EVERETT C. McKEAGE
s/ BORIS H. LAKUSTA
s/ WILSON E. ~~CAINE~~

Attorneys for the Public Utilities Commission of the State of California

Dated: San Francisco, California,
October 8, 1951.

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100 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title Omitted)

STATE OF CALIFORNIA
City and County of San Francisco } ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one
101 years, and neither a party to nor interested in the above proceeding.

That on the 8th day of October, 1951, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within ANSWER TO PETITIONS FOR WRIT OF REVIEW, addressed to the following attorneys:

James R. Browning, Esq.
Acting Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

L. E. Blaisdell, Esq.
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.
c/o California Electric Power Co.,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D. C., Hawthorne, Nevada, and Riverside, California, respectively.

s/ GRACE E. HUNT

Subscribed and sworn to before me this 8th day of October 1951.

s/ R. J. PAJALICK
Secretary, Public Utilities Commission of the State of California

SEAL

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103 SUPREME COURT OF THE STATE OF CALIFORNIA

(Title Omitted)

Answer of California Electric Power Company to Petition for Writ of Review—Filed Oct. 8, 1951

California Electric Power Company, a corporation, Respondent above named, for answer to the Petition for Writ of Review, states:

I

Admits that this Respondent did supply electric energy to the United States, Navy Department, Bureau of Yards and Docks under a contract, dated July 1, 1943, and avers that said contract between this Respondent and the United States provided in part as follows:

"That from and after the first day of July, 1943, until the end of the fiscal year 1944, and thereafter until sixty (60) days' written notice to the contrary is given by either party to the other, the Company agrees to furnish to the Government, and the Government agrees to purchase from the Company, all electric energy required by the Government delivered at the Company's Mill Creek (Jordan) Power Plant,
104 located near Lundy Lake, Mono County, California, for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada, except such electric energy as may be generated by the Government on such premises." * * *

II

This Respondent avers that said contract provided only for the sale of energy by Respondent to the United States "for use of the

Government's Naval Ammunition Depot, Hawthorne, Nevada," and that this Respondent did not therein or otherwise or at any time undertake or agree to sell or deliver energy to the United States for resale; denies that all or any part of such energy so purchased by the United States is or has been resold by it as alleged in the Petition, or otherwise, within the intent and meaning of Federal Power Act; avers that all such energy is used by the United States for said Naval Ammunition Depot, and that, if a substantial part or any part of the energy so purchased by the United States or its Navy Department is resold, the same has been in derogation of said contract and unauthorized by Respondent; that it is the practice and policy of Respondent to charge a higher rate for energy to be resold by a purchaser than for energy to be consumed by a purchaser; that if Petitioner, after purchasing energy from Respondent under Schedule P-2, which quotes rates for industrial power to be consumed by the purchaser, thereafter resold any thereof, the same constituted deception and an unjustified abuse of respondent's published rate schedules; and that said Petition does not allege that Respondent sold any electric energy to the United States "for resale."

105

III

Respondent avers that it not only attempted to terminate said contract, but did terminate the same as of October 1, 1948, by 60 days' written notice to the Petitioner in accordance with the mutual termination privileges set forth in said contract; that Respondent did bill the Petitioner in accordance with Schedule P-2 fixed by Public Utilities Commission of California; and that the Petitioner refused and still refuses to pay the excess thereof above the rates named in said terminated contract.

IV

Respondent denies that Public Utilities Commission of California erred in any of the respects set forth in paragraph XI of the Petition herein, including Exhibit B, attached thereto, or otherwise or at all in any of the proceedings mentioned in the Petition herein.

V

This Respondent denies that the Legal Department of Public Utilities Commission of California intervened in the Federal Power Commission's proceedings mentioned in paragraph VIII of the Petition herein, and denies that said Legal Department became a party thereto, but avers that said Legal Department entered its appearance in the concurrent hearing before Federal Power Commission and Public Utilities Commission of California examined witnesses and filed a brief and an application for rehearing therein.

VI

Respondent avers that, if the allegation in paragraph IV of the Petition herein, to the effect that a substantial part of the electric energy purchased by the United States is resold to domestic
106 and commercial customers be construed as alleging that such energy is sold by Respondent to the United States for resale within the meaning of Sec. 201 (b) and (d) of Federal Power Act, then, the allegations of paragraph IX of the Petition herein show that the Order issued April 13, 1950 by Federal Power Commission was and is unlawful in that it directed Respondent to sell energy to the United States for resale under said contract which provided for sale of energy only "for use of the Government's Ammunition Depot, Hawthorne, Nevada." Respondent avers that said Order was unlawful for the further reason that said contract had long since been terminated in accordance with its terms.

VII

This Respondent avers that, as alleged in paragraph II of the Petition herein and as found by Federal Power Commission in said Order of April 13, 1951, this Respondent is a licensee under Part I of Federal Power Act (Secs. 1-29; 16 U.S. Code Secs. 791-823) and holds licenses for five projects consisting of seven hydro-electric power plants located in Mono and Inyo Counties, California, all of which Respondent owns and operates as a public service corporation and in developing, transmitting, and distributing power for sale and use in public service, and that part of the electric energy generated in each and all of said projects is sold and delivered to the United States at Respondent's Mill Creek Plant in Mono County, California, for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada, and is transmitted by the United States from said Mill Creek plant to said Naval Ammunition Depot in Nevada solely over and by means of a transmission line owned, maintained and operated by the United States between said points.

107 VIII

Section 19 of Federal Power Act (16 U.S. Code Sec. 812) provides in effect that, as a condition of all such licenses, every licensee which is a public service corporation or corporation owning or operating any such project and developing, transmitting or distributing power for sale or use in public service shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power and of rates and charges of payment therefor as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the

rate charged. That in case such State has not authorized or empowered a commission or other agency to regulate such services and rates, jurisdiction is conferred upon Federal Power Commission to exercise such regulation until such state shall have provided such Commission or authority for such regulation, and that such jurisdiction of Federal Power Commission shall cease and determine as soon as such state shall have provided such commission.

IX

The provisions of said Section 19 are expressly incorporated in each of this Respondent's said licenses and is a contractual arrangement between the United States and Petitioner founded upon an adequate consideration and is immune from impairment under Amendment V to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

X

The State of California has and, at all times herein mentioned, had authorized and empowered a commission (Public Utilities Commission, Respondent herein) within said State to regulate
108 services and rates of this Respondent as provided in said Section 19 of Federal Power Act, and said Commission has, at all times herein mentioned, regulated this Respondent's services and rates in accordance with the Public Utilities Act of said State (Deering's G. L. Act 6386).

XI

Section 20 of said Federal Power Act (16 U.S. Code Sec. 813) provides in effect that, when said power or any part thereof shall enter into interstate commerce, the rates charged and the service rendered by such licensee shall be reasonable, non-discriminatory and just, and that whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this Section within such State, or such States are unable to agree through their properly constituted authorities, jurisdiction is conferred upon Federal Power Commission to enforce the provisions of this Section and to regulate so much of services and rates as constitute interstate commerce.

XII

Section 6 of said Federal Power Act (16 U. S. Code Sec. 799) operates so as to incorporate the provisions of said Section 20 of said Act as a contractual provision of all of this Respondent's said licenses, which is based upon an adequate consideration and is immune from impairment under Amendment V to the Constitu-

tion of the United States and Sections 13 and 14 of Article I of the Constitution of California.

XIII

The States of California and Nevada are the only States which are directly concerned in the matters referred to in the
109 Petition herein or in said Section 20 and each of said States has provided a Commission to enforce the provisions of said Section 20 within such states. (Deering's G. L. Act 6386; Nev. Comp. L. 1929, Secs. 6100 et seq.), and there is no allegation in said Petition that said States are unable to agree as provided in said Section 20 of Federal Power Act.

XIV

The rates of this Respondent referred to in the Petition herein are not subject to regulation by Federal Power Commission under Part II of Federal Power Act (Secs. 201-209; 16 U.S. Code Secs. 824-824h) for the following reasons:

(a) The rate regulatory features of Part II of Federal Power Act (Secs. 201, 205 and 206; 16 U.S. Code Secs. 824, 824d and 824e) do not apply to licensees under Part I of said Act for the reason that regulation thereof is vested in State Commission or Commissions under Sections 19 and 20 of said Act as contractual stipulations between the United States and the licensees, including this Respondent.

(b) Under Sec. 201 of Federal Power Act (16 U.S. Code Sec. 824) Federal Power Commission has jurisdiction only over rates for the transmission of electric energy in interstate commerce and for the sale of energy at wholesale (for resale) in interstate commerce; and neither the rates nor sales mentioned in the Petition herein are for either of such purposes.

(c) Such sales are not sales in interstate commerce, for the reason that under Sec. 201(f) of said Act, none of the provisions of Part II of said Act apply to the United States or any
110 agency, authority or instrumentality thereof and, hence, the definition of interstate commerce in Sec. 201(c) of said Act does not apply to the United States and neither the United States nor its Navy Department is or can be engaged in interstate commerce under Part II of said Act;

(d) Such sales to the United States are not sales at wholesale as defined in Sec. 201(b) and (d) of said Act, for the reason that they are not made to a "person," as defined in Sec. 3(3), (4) and (7) of said Act.

XV

Federal Power Commission had no authority to order this Respondent to reinstate the terminated contract of July 1, 1943, between this Respondent and the United States, (a) because said contract had been cancelled in accordance with its terms a year and a half before said order of Federal Power Commission was issued on April 13, 1951; and (b) because said contract provided solely for the sale of electric energy for consumption by the United States, that is, "for use of the Government's Ammunition Depot, Hawthorne, Nevada" and Section 201 of Federal Power Act denies jurisdiction in Federal Power Commission over rates for energy sold either in intrastate or interstate commerce for consumption by the purchaser; and (c) because the United States is simply and only a distribution customer on Respondent's 55 kv system used in the distribution of electric energy in Mono County, California, which transaction is excluded from the jurisdiction of Federal Power Commission by Sec. 201(a) of said Act.

111 Wherefore, this Respondent prays that the Petition herein be dismissed.

s/ HENRY W. COIL
s/ H. M. HAMMACK
s/ DONALD J. CARMAN
s/ KENNETH M. LEMMON
Attorneys for Respondent, California Electric Power Company

112 *Duly sworn to by G. C. Delvaille. Jurat omitted in printing.*

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113 STATE OF CALIFORNIA, }
COUNTY OF RIVERSIDE, } ss

RUTH WARREN, being first duly sworn, on oath deposes and says: that she is a citizen of the United States, a resident of the City of Riverside, County of Riverside, State of California, over the age of twenty-one years, and not a party to the within named cause; that affiant's business address is 3771 Eighth Street in said City of Riverside; that on the 28th day of September, 1951, affiant deposited in the United States mail in said City of Riverside, true copies of the within Answer, enclosed in sealed envelopes with all postage thereon fully prepaid, addressed, respectively as follows:

James R. Browning
Acting Assistant Attorney General
Washington, D. C.

Paul A. Sweeney, Attorney
Department of Justice
Washington, D. C.

Public Utilities Commission of California
State Building
San Francisco 2 California

L. E. Blaisdell
District Attorney
County of Mineral
Hawthorne, Nevada

That there is a regular communication by mail between said place of mailing and said places so addressed.

RUTH WARREN

Subscribed and sworn to before me this 28th day of September, 1951.

DEAN. STEVENSON
Notary Public in and for Riverside County, State of California

(SEAL)

My Commission Expires August 3, 1953.

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114 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title Omitted)
(File Endorsement Omitted)

Reply of the United States to Answer of the Public Utilities Commission of the State of California—Filed Oct. 25, 1951

At this preliminary stage of these proceedings before this Court, the United States of America does not deem it necessary or proper further to discuss the various contentions advanced by the Public Utilities Commission in support of its order, review of which is here sought, asserting jurisdiction over the sales of electric energy by California Electric Power Company to the Naval Ammunition Depot at Hawthorne, Nevada. Several of these contentions are already answered by the Points and Authorities filed by the United States in support of its petition for review. Additional discussion will be contained in the brief which will be filed on behalf of the United States when the petition for review is granted. At this point, we understand the issue before the Court is whether to grant the petition for review, and we believe that the admitted complexity of the issues involved plus the fact that the decision
115 of the Public Utilities Commission is in square conflict with that of the Federal Power Commission on the same issues

of construction of the Federal Power Act (16 U.S.C. 792 *et seq.*) plainly indicate the desirability of the granting of the petition for review.

The sole portion of the Answer of the Public Utilities Commission to which we intend to reply—and by so limiting our reply, we do not concede the soundness of any of the Commission's contentions—is the Commission's suggestion that this Court act upon the petitions herein without awaiting disposition of the proceeding to review the Federal Power Commission's order, now pending in the Court of Appeals for the Ninth Circuit. In this connection, it may be well to point out that the Public Utilities Commission has misconstrued our assignment of error No. 3. In making this assignment, we did not intend to question the jurisdiction of this Court to review the Public Utilities Commission's order, or to urge either because the issues involved relate to the construction of a federal statute or because the petition for review was filed first in the Court of Appeals for the Ninth Circuit, that this Court must defer to the Ninth Circuit. On the contrary, our assignment, as is plain on its face, is directed solely to the action of the Public Utilities Commission. It attacks the propriety of the Public Utilities Commission's action in entering an order in direct conflict with that of the Federal Power Commission, issued in a proceeding to which the Public Utilities Commission, as a party, filed briefs and moved for rehearing under the limited rehearing provisions of Section 313(a) of the Federal Power Act (16 U.S.C. 8251(a)). Thus, we believe that since the Public Utilities Commission was a party to proceeding before the Federal Power Commission,
116 it was bound under the doctrine of *res judicata* by the decision of the Federal Power Commission entered in that proceeding and consequently that it was precluded from rendering a decision in conflict with that of the Federal Power Commission. See, *e.g.*, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402-404; *United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (C.A. 7).

In light of these considerations and the further fact that the Public Utilities Commission has indicated that it expects to seek permission to file a brief *amicus curiae* in the Ninth Circuit's proceeding (Answer, p. 5), we urge this Court (a) to decline to accede to the suggestion of the Public Utilities Commission to act upon the petitions herein without awaiting disposition of the proceeding before the Court of Appeals for the Ninth Circuit and (b) to withhold action on the petition for review until the proceeding before the Court of Appeals for the Ninth Circuit has been finally disposed of. Such a course would appear to be in the interests of the efficient administration of justice, both because the views of all those interested in the issues here involved would be presented to the Ninth Circuit and because it would operate

to conserve the time of this Court, as well as the time, efforts and expense involved in preparing two sets of briefs and records.

Respectfully submitted,

s/ HOLMES BALDRIDGE,
Assistant Attorney General.

s/ PAUL A. SWEENEY,
s/ MELVIN RICHTER,
Attorneys,
Department of Justice.

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AFFIDAVIT OF SERVICE

ANGELINE AGAGLIATI, being first duly sworn, deposes and says: That she is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 23d day of October, 1951, in the City of Washington, D. C., she personally deposited in the United States Mail copies of the within REPLY OF THE UNITED STATES TO ANSWER OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, addressed to the following attorneys:

Everett C. McKeage, Esquire
c/o Public Utilities Commission of the State of California,
San Francisco 2, California.

Henry W. Coil, Esquire
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorneys for the United States have their offices in Washington, D. C. That there is a regular communication by mail between Washington, D. C. and San Francisco and Riverside, California, respectively.

s/ ANGELINE AGAGLIATI

Sworn and subscribed to before me this 23rd day of October, 1951.

s/ MADELINE MACDONALD
Notary Public, D. C.

(SEAL)

My Commission Expires January 14, 1956.

118 S.F. No. 18463

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

(Title Omitted)

Order Denying Writ of Review—Filed Jan. 21, 1952

Petition for writ of review DENIED.

Gibson, C. J., Carter, J. and Spence J. voting for issuance of a writ.

(File Endorsement Omitted)

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119 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(File Endorsement Omitted)

(Title Omitted)

Petition for Rehearing of Denial of Petition for Writ of Review—Filed Feb. 5, 1952

The United States of America, by Assistant Attorney General Holmes Baldridge, acting under the direction of the Attorney General, respectfully petitions this Honorable Court for rehearing of the Court's denial of the petition for writ of review in the above-captioned case.

In the order, which is the subject matter of the instant proceeding, the Public Utilities Commission has, we believe, erroneously construed the Federal Power Act (16 U.S.C. 792 *et seq.*) to
120 vest jurisdiction in it (to the exclusion of the Federal Power Commission) over the sales of electric energy by the Company to the Naval Ammunition Depot in Hawthorne, Nevada. The Public Utilities Commission has accordingly undertaken to exercise jurisdiction over these sales and has authorized the Company to charge therefor rates different from (and higher than) those contained in the contract of July 1, 1943 between the Company and the Navy.

In square conflict with the Public Utilities Commission's order, the Federal Power Commission, in its order of April 13, 1951, review of which is now pending in the Court of Appeals for the Ninth Circuit on the petition of the Company, has held that the Federal Power Act vests jurisdiction in it (rather than the Public Utilities Commission) over the rates for these sales by the Company to the Navy and has directed the Company to file with it the July 1, 1943 contract between the Company and the Navy as the rate schedule for these sales. We anticipate that this case will be heard by the Ninth Circuit in the late Spring of this year.

If the Ninth Circuit affirms the Federal Power Commission's order, this Court's refusal to review the decision of the Public Utilities Commission, which at the best is of doubtful validity, will place the United States as well as the Company in a dilemma as to which of the two commissions has jurisdiction in the premises, and efforts to comply with the order of one of the commissions may give rise to possible violations of the order of the other commission with concomitant liabilities, at least as far as the
121 Company is concerned, for fines and penalties. Moreover, additional litigation may be necessary finally to determine which of the two commissions has jurisdiction particularly in connection with the liability of the Navy under its letter of June 29, 1949 indicating its intent to pay, if it is unable to obtain an agreement from the Company for a different rate, the rate fixed or approved by "the regulatory body having jurisdiction in the premises." This need for relitigating this issue as to jurisdiction may be obviated by this Court, if it grants a Writ of Review in this case or if it withholds decision on this Petition for Rehearing until the Court of Appeals for the Ninth Circuit decides the issues in the case now pending before it.

WHEREFORE, the United States prays this Honorable Court to grant this petition for rehearing, to grant the petition for a Writ of Review and to determine the question of jurisdiction of the Public Utilities Commission on the briefs and oral arguments of the parties. Alternatively, the United States prays that action on this petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion in *California Electric Power Company* v. *Federal Power Commission*, No. 12987, now pending before that Court.

DATED this first day of February, 1952.

/s/ HOLMES BALDRIDGE,
Assistant Attorney General.

/s/ PAUL A. SWEENEY,
/s/ MELVIN RICHTER,
Attorneys, Department of Justice.

122 AFFIDAVIT OF SERVICE

ANGELINE AGAGLIATI, being first duly sworn, deposes and says: That she is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 1st day of February, 1952, in the City of Washington, D. C., she personally deposited in the United States Mail copies

of the within PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF REVIEW, addressed to the following attorneys:

Everett C. McKeage, Esquire
c/o Public Utilities Commission of the State of California,
San Francisco, 2, California.

Henry W. Coil, Esquire
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorneys for the United States have their offices in Washington, D. C. That there is a regular communication by mail between Washington, D. C. and San Francisco and Riverside, California, respectively.

s/ ANGELINE AGAGLIATI

Sworn and subscribed to before me this 1st day of February, 1952.

s/ GLADYS E. McGAFFEY
Notary Public, D. C.

(SEAL)

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125 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Title Omitted)

Answer of California Public Utilities Commisson to Petition for Rehearing of Denial of Petition for Writ of Review.

Filed Feb. 8, 1952

This Court on January 21, 1952, denied petitions for writ of review sought by the United States and Mineral County, Nevada, herein.

126 The two petitioners have now served and filed in this Court petitions for rehearing, seeking that writs of review as originally prayed be granted and that the issues be determined "on the briefs and oral arguments," or in the alternative that "action on this petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion . . ."

Neither petitioner presents any sound reason for the relief prayed, nor any new matter. Each points to the decision of the California Public Utilities Commission as being in conflict with that of the Federal Power Commission and suggests that the utility California Electric Power Company may be faced with penalties or fines because of inability to obey conflicting orders. No argument is made on the merits.

It is submitted that the petitions for rehearing reveal a misunderstanding of the law in a number of respects.

A. *Effect of Denial of Writ of Review.*

In seeking a determination of the issues "on the briefs and oral arguments" and in suggesting that such course will obviate the "need for relitigating the issue as to jurisdiction," the petitioners evince ignorance of the effect of this Court's denial of a writ of review. Such denial constitutes an affirmance of the Commission's decision on the merits. As this Court stated in *Southern California Edison Co.* v. *Railroad Commission* (1936), 6 Cal. 2d 737, at 748:

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> "... it should be observed that under the State Constitution and the Public Utilities Act, the powers of this court in a proceeding to review an order or decision of the commission are not limited to the considerations incident to the writ of *certiorari* or review mentioned and provided for in section 4 of article VI of the Constitution and sections 1067-1077 of the Code of Civil Procedure."

Again, on page 756, this Court said:

> "... The denial of the petition for a writ of review in each case must be deemed a determination of the point..."

In *Napa Valley Electric Co.* v. *Railroad Commission* (1920), 251 U.S. 366, 64 L. ed. 310, the United States Supreme Court said, in referring to the effect of a denial by the California Supreme Court of a writ to review an order of the Commission (251 U.S. at 373):

> "... absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented..."

To like effect is *Southern Pacific Co.* v. *Van Hoosear* (1934), 72 F. 2d 903.

B. *Concurrent Jurisdiction of California Supreme Court.*

While petitioners do not expressly say so, they create the implication that this Court should be subservient to the determination of a federal administrative agency and should await the outcome of a federal court review of such determination. As shown in our Answer to the Petitions for Writs of Review herein (pp. 26-28), state tribunals have equal jurisdiction with federal tribunals to construe federal law and determine whether

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that law allows concurrent jurisdiction in the state and federal tribunals, or whether it gives exclusive jurisdiction in the federal tribunal. To repeat the language of this Court in *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119, 122:

> "... Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law permits state jurisdiction.

> See *Grubb* v. *Public Utilities Commission* (1930), 281 U.S. 470, 74 L. ed. 972.

Indeed, in that case it was held that the decision of the state court, once final because of expiration of the period for appeal to the United States Supreme Court, estopped the appellant from further litigation in the federal court.

129 C. *Effect of Delay in Acting upon Petition for Rehearing.*

As an alternative to the issuance of a writ of review, petitioners ask that action on the petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion in the cognate proceeding. Apparently, petitioners are unfamiliar with this Court's Rule 27(e) which provides:

> "If no order [on petition for rehearing] is made before the decision becomes final, the petition shall be deemed denied."

Petitioners could hardly have intended to make the alternative request.

D. *Effect of California Supreme Court Decision upon California Electric Power Company.*

The United States argues that the petition for rehearing should be granted because the utility will otherwise be caught between conflicting orders, with the possibility of incurring fines and penalties. There are two answers. First, it is hardly befitting the United States to appropriate an argument which belongs to the utility only. Secondly, the record in the proceeding before the Court of Appeals Ninth Circuit (No. 12987), reveals that a stay order was

issued by that Court on August 29, 1951. The argument of the United States indicates that its counsel have not bothered to ascertain the state of the record.

CONCLUSION

In view of the foregoing, it is submitted that the petitions for rehearing should be denied.

Respectfully submitted,

EVERETT C. McKEAGE
BORIS H. LAKUSTA
WILSON E. CLINE
Attorneys for the Public Utilities Commission of the State of California

Dated: San Francisco, California, February 8, 1952.

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131 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. No. 18463

THE UNITED STATES OF AMERICA, *Petitioner*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, *Respondents.*

S.F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, *Petitioner*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, *Respondent.*

STATE OF CALIFORNIA
City and County of San Francisco } ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one years, and
132 neither a party to nor interested in the above proceedings.

That on the 8th day of February, 1952, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within ANSWER TO PETITION FOR REHEAR-

ING OF DENIAL OF PETITION FOR WRIT OF REVIEW addressed to the following attorneys:

Holmes Baldridge, Esq.
Asst. Attorney General,
Department of Justice,
Washington 25, D,C.

L. E. Blaisdell, Esq.
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D.C., Hawthorne, Nevada, and Riverside, California, respectively.

S/ GRACE E. HUNT

Subscribed and sworn to before me this 8th day of February, 1952.

S/ R. J. PAJALICK
Secretary, Public Utilities Commission of the State of California.

(SEAL)

S.F. No. 18463

133 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

(Title Omitted)

Order Denying Rehearing—Filed Feb. 18, 1952

.....petition for rehearing DENIED.

Gibson, C. J., Carter, J. and Spence, J. voting for a rehearing.

GIBSON
Chief Justice

(File Endorsement Omitted)

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134 Clerk's certificate to foregoing transcript omitted in printing.

(Title Omitted)

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,
IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1952.

WM. O. Douglas
Associate Justice of the Supreme Court of the United States.

Dated this 17th day of April, 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952 — 216371/P O 115

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

ORDER ALLOWING CERTIORARI FILED OCTOBER 13, 1952.

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

238206—52

[fol. 5] Commission in said matter against your Petitioner be annulled, vacated and set aside.

3. That in the meantime said Public Utilities Commission and Respondents be required to desist from further proceedings in said matter to be reviewed, and that said Commission be required to refrain from any further action therein.

4. That your Petitioner recover its costs herein; and for such further and additional relief as may be proper and just in the premises.

Dated: This 28th day of August, 1951.

(S.) L. E. Blaisdell, Walter Rowson, Attorneys for Petitioner.

Of Counsel: Walter Rowson, Reno, Nevada. (Admitted in California.)

[fol. 5½] *Duly sworn to by Ddvid L. Hermansen. Jurat omitted in printing.*

[fol. 6] POINTS AND AUTHORITIES

Federal Power Commission Opinion No. 212 and cases cited therein. The said opinion, as Petitioner is informed, will be an exhibit in the Petition for Review to be filed by the United States Government, reference to which is made. Counsel for Petitioner cannot, in the time remaining, append the same hereto and begs this Honorable Court's indulgence for the omission at this time.

Respectfully submitted, (S.) L. E. Blaisdell, Attorney for Petitioner.

[fol. 7] EXHIBIT A TO PETITION

Decision No. 45913

Before the Public Utilities Commission of the State of California.

Application No. 28791, 1st and 2nd Supplemental

APPLICATION OF CALIFORNIA ELECTRIC POWER COMPANY FOR AN INCREASE IN RATES

Henry W. Coil, for applicant, California Electric Power Company; L. E. Blaisdell, Esquire, Mineral County District Attorney, and Ex-Officio Attorney for the Mineral County Power System, for the Mineral County Power System; Oliver Rands, Hamilton Treadway, and F. E. Denniston, for the United States Navy; Boris H. Lakusta, for the Commission's staff.

APPLICATION FOR REHEARING

L. E. Blaisdell, District Attorney and Ex-Officio, Attorney for the Mineral County Power System.

[fol. 8] Decision No. 45913

Before the Public Utilities Commission of the State of California.

Application No. 28791, 1st and 2nd Supplemental

APPLICATION OF CALIFORNIA ELECTRIC POWER COMPANY FOR AN INCREASE IN RATES

Henry W. Coil, for applicant, California Electric Power Company; *L. E. Blaisdell, Esquire*, Mineral County District Attorney, and Ex-Officio Attorney for the Mineral County Power System, for the Mineral County Power System; *Oliver Rands, Hamilton Treadway*, and *F. W. Denniston*, for the United States Navy; *Boris H. Lakusta*, for the Commission's staff.

Application for Rehearing

To the Public Utilities Commission, of the State of California:

The Mineral County Power System, by its Attorney, L. E. Blaisdell, Esquire, Mineral County District Attorney, and by Nevada Statutes ex-officio attorney for the Mineral County Power System, hereby applies for rehearing in the above entitled matter with respect to the Opinion, Findings and Order issued July 3rd, 1951, on the following grounds:

First

That a final order of the Federal Power Commission, being opinion No. 212, Docket No. E-6269, issued April 13, 1951, is in full force and effect, reference to which is made, holding that jurisdiction rests with the Federal Power Commission, in the matter under consideration, and denying Jurisdiction in the Public Utilities Commission of the State of California (hereinafter called Commission.) That [fol. 9] the California Electric Power Company has filed a petition, dated June 20, 1951, with the United States Court of Appeals for the Ninth Circuit for review of the Federal Power Commission's Opinion and Orders. That the Commission of the State of California, in the order set out in its said Opinion, is virtually directing the California Electric Power Company to act in disregard of the Federal Power Commission's Opinion and Order.

Second

Part I of the Act.

That the Opinion of the Commission of the State of California on page 16 of its opinion, cites Section 16 of Nevada Statutes 1925, but is apparently unadvised with respect to Section 2 of said act excluding Nevada Public Service Jurisdiction, which reads as follows:

> "Section 2. The board of county commissioners * * * shall have authority to enter into any and all necessary contracts with any person, firm or corporation, *either within or without the State of Nevada*, for the purchase of electric energy and current * * *

Part II of the Act

The exemption under section 201 (f) may be construed to exempt Mineral County Power System from jurisdiction of the Federal Power Commission but no citation of authority appears showing or indicating an exemption as to the California Electric Power Company.

[fol. 10] Conclusion

It is submitted that the errors above stated are such that a rehearing ought to be granted so that proceedings under Application No. 28791, 1st and 2nd Supplemental, may be held in abeyance until a final determination of the question of jurisdiction in pending proceedings has been reached in the Federal Courts.

Respectfully submitted, L. E. Blaisdell, Mineral County District Attorney and Ex-Officio Attorney for Mineral County Power System.

Dated: This 19th day of July, 1951, Hawthorne, Nevada.

[fol. 11] *Duly sworn to by L. E. Blaisdell. Jurat omitted in printing.*

[fol. 12] Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed, with postage prepaid, to:

Henry W. Coil, Esq., c/o California Electric Power Company, Riverside, California, Attorney for California Electric Power Company.

Hamilton Treadwell, Esq., Bureau of Yards & Docks, Navy Department, Washington, D. C., Attorney for Navy Department.

Howard F. Wahrenbrock, Esq., Federal Power Commission, Washington 25, D. C., Attorney for staff, Federal Power Commission.

Boris H. Lakusta, Esq., Public Utilities Commission of California, State Building, San Francisco 2, California, Counsel of Public Utilities Commission of California.

Dated at Hawthorne, Nevada, this 19th day of July, 1951.

L. E. Blaisdell, District Attorney and Ex-Officio, Attorney for the Mineral County Power System.

[fol. 13] AFFIDAVIT OF MAILING

STATE OF NEVADA,
County of Mineral, ss.

Dora M. Wilson being first duly sworn, deposes and says: That she is over the age of twenty-one, and not a party of interest herein; that on the 28th day of August, 1951, she served the foregoing document upon the Respondents in this proceedings, by mailing a copy thereof properly addressed, with postage prepaid, to:

California Electric Power Company, Riverside, California.

Public Utilities Commission of California, State Building, San Francisco 2, California.

S/ Dora M. Wilson.

Subscribed and sworn to before me this 28th day of August, 1951. (S.) J. J. Connelly, Notary Public, State of Nevada. My Commission expires: June 10, 1954. (Seal.)

[fol. 14] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

ANSWER OF PUBLIC UTILITIES COMMISSION OF CALIFORNIA TO PETITION FOR WRIT OF REVIEW—Filed October 8, 1951

The Public Utilities Commission herewith respectfully submits its answer to the two petitions for writ of review herein. Each challenges the Commission's Decision No. 45913, issued July 3, 1951. (The decision is appended as Exhibit A to the petition for a writ filed by the United States.) While the grounds alleged in the two petitions [fol. 15] correspond only in part and while there are substantial factual differences relating to each petitioner which had to be given effect by the Commission in issuing its decision, the same basic argument dominates both petitions, viz., that the California Commission was without authority to render the decision it did, being precluded by the interstate commerce clause (Federal Const., Art. I, Sec. 8) and the Federal Power Act (1935, c. 687, 49 Stat. 841, 16 U. S. C. A., Sec. 791, et seq.). This circumstance suggests the appropriateness of a single document in answer to both petitions. It appears that needless repetition can thereby be avoided and the pattern of the Commission's reasoning more clearly set forth. The Court's acceptance of a single answer is, therefore, respectfully sought.

Quite simply the decision under attack did two things:

(1) it *authorized* California Electric Power Company to charge certain electric rates to the Navy Department for sales at Mill Creek, California, the energy to be transported by the Navy from Mill Creek to Nevada for use of the Naval Ammunition Depot at Hawthorne; (2) it

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, PETITIONER,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 16, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, PETITIONER,

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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. ——

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

PETITION FOR WRIT OF REVIEW—Filed August 30, 1951

To the Honorable the Supreme Court of the State of California:

The Petition of the County of Mineral, State of Nevada respectfully shows:

I

That Petitioner is a political subdivision of the State of Nevada, and the owner of the Mineral County Power System, which is a public utility engaged in the sale of electrical energy to inhabitants of Mineral County.

II

That Respondent Public Utilities Commission is an administrative agency of the State of California.

III

That Respondent California Electric Power Company, is a corporation doing business in the sale of electric energy.

IV

That the California Electric Power Company, on August [fol. 2] 8, 1949, filed its first supplemental application No. 29791 before the Public Utilities Commission of the State of California to determine whether rate Schedule

P-3 was and had been since October 1, 1948 applicable to the sale of electric service to the Mineral County Power System, Mineral County, Nevada. Petitioner protested said application, appeared therein and is a party thereto.

V

That on July 3, 1951, Respondent Commission made and entered in said proceedings its order, (Decision No. 45913), in favor of Respondent Company "authorizing" Respondent Company to charge to and collect from Mineral County rate Schedule P-3 for service to said County.

Thereafter on July 19, 1951, Petitioner filed with Respondent Commission a Petition for Rehearing, setting forth the particulars in which your Petitioner alleges the Respondent Commission was in error.

That on July 31, 1951 Respondent Commission denied said application without hearing and without modification of its order theretofore entered, Decision No. 46004.

That a copy of said Petition for Rehearing is attached hereto, marked EXHIBIT "A", and by this reference made a part hereof.

VI

That on February 14, 1950 the Federal Power Commission issued and served on Respondent Company an Order to show cause why certain Findings and Orders should not be [fol. 3] made and entered against Petitioner, Federal Power Commission Docket No. 6269, in the matter of the California Electric Power Company; that hearings were held by Respondent Commission and the Federal Power Commission which hearings were part of the official proceedings of the cases before each of the commissions.

That on April 13, 1951, the Federal Power Commission made and entered in Docket E-6269 its order, Opinion No. 212, holding that the Federal Power Commission has jurisdiction over the terms and conditions of sale of electric energy by Respondent Company to said Mineral County Power System, Mineral County Nevada to which reference is made.

That on June 5, 1951, the Federal Power Commission denied applications for rehearing by both Respondents.

That on June 20, 1951, Respondent Company filed in the United States Court of Appeals for the Ninth Circuit a Petition to Review and Set Aside the Order of the Federal Power Commission contained in said Opinion No. 212, *California Electric Power Company* vs. *Federal Power Commission, No. 12987*, and on July 31, 1951, Respondent Company filed the Motion to Stay Order in said proceeding in the United States Court of Appeals.

VII

That your Petitioner avers in support of this Petition that the Respondent Commission in rendering its order and [fol. 4] opinion in the original proceedings, and in denying Petitioner's application for Rehearing, acted without, and in excess of its powers and jurisdiction and that said Opinion is unlawful.

Your Petitioner incorporates herein by reference its objections to said Opinion and Order as the same are set forth in its application for rehearing before said Commission, which same are set forth in full in EXHIBIT "A" hereof.

VIII

That your Petitioner has not the right to appeal from said Opinion and Order of said Commission and has no plain, speedy or adequate remedy other than by Writ of Review. That your Petitioner is a party beneficially interested in this proceeding, and the names of the parties interested whose rights will be affected by this Petition are your Petitioner and the Respondents herein.

Wherefore, Your Petitioner prays:

1. That a Writ of Review issue out of this Court to the said Public Utilities Commission commanding it to certify fully to this Court at a specific time and place the records and proceedings in said 1st Supplemental Application to Application No. 28791, and that the same be inquired into and determined by this Court.

2. That said matters and record be fully determined and considered by this Court, and that it be ordered, adjudged and decreed that said Order made by said Public Utilities

directed California Electric Power Company to charge certain electric rates to Mineral County Power System (the operating name for the County of Mineral, Nevada, in its proprietary capacity as the seller of electric energy at retail) for sales at Mill Creek, California, the energy to [fol. 16] be transported by Mineral County Power System from Mill Creek to Nevada for resale to retail customers in that state. The reason for *authorizing* rather than directing the imposition of rates in the case of the Navy lay in the fact that, pursuant to Public Utilities Act, Section 17(b) (now Public Utilities Code, Section 532), the Commission had, in 1942, issued a general order (General Order No. 96), providing in Section X-B thereof that an electric utility could, if it saw fit, furnish service to the United States and its departments at "free or reduced rates." Mineral County, on the other hand, does not come within the terms of such General Order.

The Commission's decision, authorizing rates in the case of the Navy and directing rates in the case of Mineral County Power System, was the result of two applications filed with the Commission by California Electric Power Company seeking to have the Commission determine whether an earlier general rate increase decision (Decision No. 41798 of July 1, 1948) should be construed to apply to the two types of sales in question. During the pendency of such applications, and after the first day's hearing thereon, it became apparent that the jurisdiction of the California Commission to make rate orders respecting the sales referred to hinged upon the proper interpretation of both the interstate commerce clause and the Federal Power Act. It was at that juncture that the Federal Power Com- [fol. 17] mission, having learned of the California Commission proceeding, decided to institute its own proceeding to inquire into the matter. In implementation thereof it issued an order to show cause against California Electric Power Company (FPC Docket No. 3-6269). By mutual agreement of the California and Federal commissions, a concurrent hearing was thereafter held in San Francisco. The effect of such procedure was to make the evidence adduced during the concurrent hearing equally a part of the

record in each of the two proceedings. The Legal Department of the California Commission entered an appearance at such concurrent hearing and argued by subsequent briefs that jurisdiction over the rates in question lay solely in the California Commission.

While the Federal Commission proceeding was instituted later than the California Commission proceeding, the Federal Commission was the first to issue an opinion. (FPC Opinion No. 212, issued April 13, 1951.) Such opinion, contrary to the Federal Examiner's proposals, asserted jurisdiction in the federal body, Commissioner Smith dissenting. A petition to have such Federal Commission order set aside was filed on June 21, 1951, by California Electric Power Company in the United States Court of Appeals for the Ninth Circuit. (U. S. Ct. of Apps., 9th Circuit, Docket No. 12987.) That review proceeding is now pending and the California Commission will seek permission [fol. 18] at the appropriate time to file an amicus curiae brief therein. On July 3, 1951, the California Commission issued its own decision, Decision No. 45913, holding that neither the interstate commerce clause nor the Federal Power Act precluded California Commission jurisdiction. It further held that its earlier general rate increase decision affecting California Electric Power Company (Decision No. 41798) should be construed to apply to the sales in question. Accordingly, it issued its order authorizing certain rates to be charged to the Navy and directing certain rates to be charged to Mineral County, as mentioned above. That is the decision here assailed by the United States (Navy Department) and Mineral County, Nevada.

It is conceded that petitioners have perfected their right to seek review here by exhausting the administrative remedy. Both filed petitions for rehearing which were denied. Public Utilities Act, Section 67 (now Public Utilities Code, Section 1756, Stats. 1951, ch. 764). It is further conceded that they are entitled to urge the several grounds presented by them to this Court because such grounds were urged in their respective petitions for rehearing. Public Utilities Act, Section 66 (now Public Utilities Code, Section 1732, Stats. 1951, ch. 764).

The grounds for review urged before this Court by the [fol. 19] United States (Navy Department) are as follows:

1. It was error for the California Commission to hold that the sales to the Navy are not in interstate commerce.

2. It was error for the California Commission to hold that the sales to the Navy even if held to be in interstate commerce are subject to the California Commission's jurisdiction.

3. It was error to issue a decision in square conflict with the Federal Power Commission's order in a proceeding in which the Legal Department of the Public Utilities Commission participated as a party and in which review proceedings are pending before the Court of Appeals for the Ninth Circuit.

4. It was error to construe the Commission's earlier general rate increase decision (Decision No. 41798 of July 1, 1948) as covering the sales by California Electric Power Company to the Navy and as authorizing the application of the company's Schedule P-2.

Mineral County urges the following grounds for review:

1. The California Commission acted in excess of its powers and jurisdiction.

2. It was error to issue a decision in square conflict with the Federal Power Commission's opinion.

3. The California Commission did not take cognizance of a certain provision in the Nevada laws.

4. The California Commission misconstrued Section 201(f) of the Federal Power Act.

An examination of the several grounds listed reveals one manifest misstatement on the part of each petitioner. The United States, in alleging in its Ground No. 1 that the California Commission erred in construing the sales to the Navy as not in interstate commerce, accuses the [fol. 20] California Commission of a position it has not taken. Nowhere in the decision does the California Commission express an opinion that the sales in question are or are not in interstate commerce. Mineral County in its

Ground No. 4 accuses the Commission of relying upon Section 201(f) of the Federal Power Act to exempt the sales in question. Nowhere in the decision does the California Commission rely upon such section or so much as mention it.

It follows that Ground No. 1 in the United States petition and Ground No. 4 in Mineral County's petition may be excluded from consideration. The remaining grounds will be dealt with in the argument which follows. It will be noted, as previously mentioned, that both petitioners challenge the jurisdiction of the California Commission to make the order it did. Furthermore, both petitioners allege that it was error for the California Commission to issue a decision in conflict with an opinion of the Federal Power Commission. The United States makes an additional contention, not shared in by Mineral County, to the effect that the California Commission misconstrued its own earlier rate decision. On the other hand, Mineral County makes an additional contention, not shared in by the United States, to the effect that the California Commission did not take full cognizance of certain provisions in the Nevada law.

We are convinced that the several contentions of the [fol. 21] petitioners are without merit. It will be the purpose of the following argument to present to this Court the cogent reasons dictating such conclusion.

Argument

I. Sales to the Navy. The California Public Utilities Commission Is Not Precluded from Exercising Jurisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to the Navy, Either Under the Interstate Commerce Clause or the Federal Power Act.

A. *Facts*

California Electric Power Company began selling electric energy to the Navy at Mill Creek, California, in 1943 pursuant to a contract for the sale of all energy required

by the government "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada." The energy is delivered to the Navy by the Company at the latter's Mill Creek generating plant. The Navy transmits such energy over a Navy-owned transmission line extending from the Mill Creek plant to the Naval Ammunition Depot at Hawthorne, Nevada. Thus, part of the transmission line is in California and part in Nevada. A large percentage of the energy furnished to the Navy is derived from hydroelectric plants operated by the Company pursuant to license as provided in Part I of the Federal Power Act. [fol. 22] The balance is derived by the Company from non-licensed sources in California. While over a long range period the greater part of the energy furnished to the Navy comes from licensed projects, there are moments when all or a portion of its comes from the non-licensed sources. The energy purchased by the Navy is consumed wholly at the Naval Ammunition Depot at Hawthorne, Nevada, which, in addition to the installations devoted directly to Naval use, includes the quarters for Naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provides living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation. The Navy makes a charge for electric energy furnished to those individuals residing in the "public quarters" or occupying premises for living or business purposes at Babbitt. Those who occupy living space in the "public quarters" and in Babbitt are tenants of the Navy and their lease agreements provide that the rental privilege ceases upon termination of employment by the Navy. Those who conduct business concessions at Babbitt are also tenants of the Navy and they occupy premises pursuant to a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot." The electric energy furnished these tenants in the "public quarters" and at Babbitt comes mainly from the supply purchased by the Navy at Mill Creek, though, on occasion, it

[fol. 23] comes from the Navy's own stand-by plants on the reservation.

It is believed the foregoing facts are not in dispute. It will be noted that they immediately raise certain basic problems:

1. Since the energy crosses a state line, is the sale by California Electric to the Navy in interstate commerce? If so, does the interstate commerce clause of the Federal Constitution preclude state jurisdiction, in the absence of federal statute? This latter question is of significance because it is arguable that, even if the sales be conceded to be in interstate commerce, the Federal Power Act does not apply to that part of the energy derived from non-licensed sources. Part I of that Act sets forth provisions applicable to "licensees" licensed under such Part, and it is arguable that California Electric is a "licensee" within the meaning of Part I only to the extent that it sells power from licensed projects. Part II of the Act, while possibly applying to electric sales regardless of whether the energy comes from licensed or non-licensed sources, regulates only sales for resale in interstate commerce, and we contend that Part II does not apply because the sales to the Navy are not for resale.

2. To what extent does the Federal Power Act apply? Since California Electric is a "licensee" under Part I, does that Part govern all sales by the Company, whether [fol. 24] the energy is derived from licensed or non-licensed sources? If the sales in question be construed to be sales for resale in interstate commerce, does Part II apply and, if so, should the language therein be construed to permit state jurisdiction? It will be the purpose of the discussion below to demonstrate that neither Part I nor Part II of the Federal Power Act presents any barrier to the exercise of jurisdiction over the sales to the Navy as undertaken by the California Commission. Such conclusion is reached whether it be assumed that Parts I and II of the Federal Power Act both apply or that only Part I or Part II applies. In this connection, the attention of the

Court is respectfully referred to the following decisions which shed some light upon the complexity of the problem:

Safe Harbor Water Power Corp. v. *FPC* (CCA, 3d, 1941), 124 F. 2d 800, cert. dnd. (1942), 316 U. S. 663, 86 L. ed. 1740.

Safe Harbor Water Power Corp. v. *FPC* (CA, 3d, 1949), 179 F. 2d 179, cert. dnd. (1950), 339 U. S. 957, 94 L. ed. 1368.

Consideration of the interstate commerce clause and the Federal Power Act follows:

B. *The Interstate Commerce Clause Does Not Preclude Jurisdiction by the California Public Utilities Commission*

Upon the facts as stated, the interstate commerce clause does not, we submit, preclude jurisdiction by the California Public Utilities Commission over the rates charged by [fol. 25] California Electric Power Company to the Navy. In *Public Utilities Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 L. ed. 549, P. U. R. 1927B 348, it was held in a case where no federal statute delineating state and federal jurisdiction was involved,[1] that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as the interstate business carried on between the two utilities is essentially national in character, and state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free. Even if it be assumed that the sales by California Electric Power Company to the Navy are in interstate commerce, regulation of the rates for such sales by the State of California is not precluded under the *Attleboro* case. That

[1] The Federal Water Power Act (1920, c. 285, 41 Stat. 1063, later incorporated as Part I of the Federal Power Act, 16 U. S. C. A., Sec. 792, et seq.) was in effect at the time of the *Attleboro* decision but was not applicable because the electric power in question was not derived from projects licensed by the federal government.

decision was based upon the proposition that the interstate commerce clause forbids state jurisdiction where a potential clash of state interests would arise from its exercise. Here, there can be no potential clash of state interests. Only one state, viz., California, is directly concerned, since Nevada has no jurisdiction over the Navy, either as to [fol. 26] the rates the Navy pays to California Electric or as to the rates the Navy charges its tenants. California's right to exercise jurisdiction arises only because it may regulate the rates of the seller California Electric, a California public utility. The purchaser of the energy, the Navy, is exempt from state jurisdiction. It is a department of the federal government; furthermore, it is not a public utility.

Another circumstance in support of the proposition that the interstate commerce clause does not preclude California jurisdiction is that the electric rates authorized by the California Commission are not rates which California Electric *must* charge the Navy. As stated heretofore, the Company is free, pursuant to Section 17 of the Public Utilities Act, as implemented by the Commission's General Order No. 96, to furnish electric service "at free or reduced rates" to a department of the United States Government.

The foregoing considerations make fairly plain that the California Commission's rate decision respecting sales to the Navy is not vulnerable as imposing an undue burden upon interstate commerce in violation of the Federal Constitution.

C. The Federal Power Act Does Not Preclude Jurisdiction by the California Public Utilities Commission

As indicated previously, this conclusion is reached [fol. 27] whether it be assumed that both Part I of the Federal Power Act (setting forth the provisions applicable where power from licensed projects is involved) and Part II (applying "to the sale of electric energy at wholesale in interstate commerce but . . . not . . . to any other sale") apply, or that either Part I or Part II applies.

1. *The Effect of Part I of the Federal Power Act.*

Turning first to Part I (derived from the Federal Water Power Act (1920, ch. 285, 41 Stat. 1063)), if it be assumed that the sales to the Navy are in interstate commerce, the applicable language is found in Section 20 providing, in so far as pertinent, that when:

> "said power or any part thereof [presumably any power furnished by a licensee] shall enter into interstate or foreign commerce the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable . . . to the customer . . .; and whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their properly constituted authorities on the services . . . or . . . rates . . . jurisdiction is hereby conferred upon the [Federal] Commission . . . to regulate . . . so much of the services . . . and . . . rates . . . therefor as constitute interstate or foreign commerce . . ."

It will be observed that Congress has conferred jurisdic- [fol. 28] tion on the Federal Power Commission under Section 20 only if any of the states directly concerned has not provided a commission or other authority to enforce the requirements of Section 20 within such state "requirements" apparently referring to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable), and, furthermore, even though the requisite state commissions or other authorities have been provided only if the states directly concerned are unable to agree on the service or rates through their properly constituted authorities.

Assuming that the language of Section 20 applies at all, it is clear, we submit, that under it, the sales to the Navy are excluded from Federal Power Commission jurisdiction. The California Commission is the kind of state "commission or other authority" contemplated by Section

20, for it has comprehensive power to regulate electric utility rates and service "within such state," viz., California. It has already been pointed out, in considering the interstate commerce clause, that California is the only state which can, because of its authority over California Electric, affect the sales to the Navy. Nevada cannot order the Navy to pay a certain rate for electricity purchased, nor can it order the Navy to charge a certain rate for electricity distributed. It follows that, since only one state is "directly concerned," no question can arise of inability as [fol. 29] between two states directly concerned to agree on the reasonableness of the rates charged to the Navy. Thus, Federal Power Commission jurisdiction is excluded because the two conditions to its exercise, as prescribed by Congress in Section 20, are absent.

2. *The Effect of Part II of the Federal Power Act*

Part II of the Federal Power Act (enacted as part of the Public Utility Act of 1935, ch. 687, 49 Stat. 803) declares in Section 201(b) that:

> "The provisions of this Part shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . ."

In addition to this jurisdictional language it is provided in the policy declaration of Section 201(a) that federal regulation of the "sale of such [electric] energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those matters which are not subject to regulation by the states."

Putting aside the question whether the sales are in interstate commerce, it is clear that the sales to the Navy do not fall within the language "sale of electric energy at wholesale," which is defined by Section 201(d) to mean "a sale of electric energy to any person for resale." The sales in question are neither sales to a "person" nor are they sales "for resale."

The word "person" is defined by Section 3(4) of the [fol. 30] Act to mean "an individual or corporation." A "corporation" by Section 3(3) means:

> "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' . . ."

It is obvious that the Navy is not a "person" as defined. Not only is the Navy not a "person" but the sales to it cannot properly be described as "sales for resale." Reference has already been made to the contract entered into in 1943 whereby California Electric agreed to supply "all electric energy required by the Government . . . for use of the Government's Ammunition Depot . . ." The evidence showed that the use in fact made of the energy furnished is consistent with such language. All of the energy is consumed on the Naval reservation; part is used in the Depot's industrial operations or dissipated in system losses; the balance is used by the individuals and business establishments located on the government reservation. Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege ceases upon termination of employment. For the [fol. 31] business concessions, the government issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot."

It follows that the sales to the Navy are in effect for its sole use and not "for resale." It is true that, in supplying electricity to those living or conducting business at the reservation, the Navy is in a sense "reselling" energy purchased from California Electric Power Company, but it is clear that the term "sale for resale" in Part II of the Federal Power Act was intended by Congress to refer to a different situation. The courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision. See *Jersey*

Central Power & Light Co. v. *FPC* (1943), 319 U. S. 61, 87 L. ed. 1258, 63 S. Ct. 953. The Navy is certainly not a public utility. Even assuming that it would not be precluded from that status by virtue of its position in the federal government, it could not be deemed a public utility by virtue of furnishing electricity to tenants whose continued tenancy depends upon the needs of the Navy landlord.

Quite aside from the conclusion thus reached, that the sales to the Navy are not to a "person for resale" under Part II of the Federal Power Act, jurisdiction is denied the Federal Power Commission by the proviso clauses of Sections 201(a) and 201(b) of Part II. Section 201(a) declares that federal regulation shall "extend only to those [fol. 32] matters which are not subject to regulation by the States" and Section 201(b), in making Part II applicable to "sales at wholesale in interstate commerce," contains the proviso that Part II "shall not apply to any other sale of electric energy." Taking these sections together and construing them in the light of their statutory history, it is plain that Congress intended the Federal Power Commission to have jurisdiction only in that area where the United States Supreme Court had declared state regulation over sales could not be exercised because of the interstate commerce clause. See *Connecticut Light and Power Co.* v. *FPC* (1945), 324 U. S. 515, 89 L. ed. 1150, 65 S. Ct. 749. In the case presented here, it has already been pointed out that the interstate commerce clause does not apply to prevent state jurisdiction, and it has further been pointed out that the machinery set up by Congress in Section 20 of Part I to enable states upon certain conditions to exercise jurisdiction without burdening interstate commerce is available upon the facts shown and makes it possible for California to regulate the sales to the Navy. Thus, both under the Constitution and Part I of the Federal Power Act, California may exercise jurisdiction. Therefore, the provisos of Sections 201(a) and 201(b) in Part II operate to deny Federal Power Commission jurisdiction under Part II. It follows that there is nothing in Part II to prevent the exercise of California jurisdiction [fol. 33] over the sales in question.

II. Sales to Mineral County Power System. The California Public Utilities Commission May Properly Exercise Jurisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to Mineral County Power System. The Right to Exercise Such Jurisdiction Is Assured by the Terms of the Federal Power Act.

A. *Facts*

As previously noted, California Electric sells electric energy to Mineral County Power System at Mill Creek, California, and the latter transmits the energy over its own line to Nevada, reselling to local consumers in Nevada. As in the case of the Navy, the evidence indicates that, while a large percentage of the energy is derived from licensed projects, there are times when all or a portion of it comes from non-licensed sources.

B. *The Right of the California Public Utilities Commission to Exercise Jurisdiction Is Assured by the Terms of the Federal Power Act.*

Upon such facts, it is submitted that the right of the California Public Utilities Commission to exercise jurisdiction, even if the sales by California Electric be considered to be in interstate commerce, is effectively provided by the terms of the Federal Power Act. It is true that, unlike the situation with respect to sales to the Navy, regulation by California of the sales to Mineral County Power System might well, standing alone, be regarded as imposing an undue burden upon interstate commerce, for [fol. 34] the State of Nevada clearly has an interest in the cost of electricity to Mineral County Power System and the rates in turn charged by it to its customers. It is in this precise kind of situation, however, that the Federal Power Act, through the machinery set up in Part I, Section 20, makes possible the exercise of state jurisdiction under certain conditions where such exercise would not impose an undue burden on interstate commerce by jeopardizing the interests of a sister state.

It is submitted that Part II of the Federal Power Act does not apply because the sales to Mineral County Power

System are not to a "person" as defined. Even if Part II were construed to apply, however, the proviso clauses previously alluded to, in Sections 201(a) and 201(b) of Part II, operate to preserve the exercise of jurisdiction recognized in Part I.

Detailed consideration of the effect of Parts I and II of the Federal Power Act upon the exercise of California Commission jurisdiction over the sales to Mineral County Power System follows:

1. *The Effect of Part I of the Federal Power Act.*

By the terms of Part I, Section 20, two conditions must be present before states directly concerned may exercise jurisdiction: (1) such states must have commissions with authority to enforce the requirements of Section 20 within the state; (2) such states must not be unable to agree upon the rates to be charged. In the case of the sales to Mineral [fol. 35] County Power System, (1) each of the states directly concerned, viz., California and Nevada, *has* provided "a commission or other authority to enforce the requirements of this section within such state," and (2) such states *have not*, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question.

Considering more specifically the first of these two conditions provided in Section 20, it cannot be seriously contended that the California Commission, entrusted as it is with very broad regulatory authority over the rates and service of utilities within the state, fails to qualify as "a commission or other authority to enforce the requirements of this section within such state." While the Nevada Public Service Commission does not exercise as great a degree of control over Mineral County Power System as it does over private organizations engaged in public service in Nevada, it nevertheless has express jurisdiction over Mineral County Power System's rates. Nevada Statutes of 1923 provide at page 55:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and

distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commis-* [fol. 36] *sion, who may revise, raise or lower the same.*" (Emphasis added.)

The quotation makes clear that the Nevada Public Service Commission is, with respect to Mineral County Power System's rates, "a commission or other authority to enforce the requirements of this section within such state."

The petitioners contend that, in order to qualify as "a commission or other authority to enforce the requirements of this section within such state," a commission must have authority not only to regulate the rates charged by a utility but the rates such utility pays for power purchased outside the state and transmitted in interstate commerce. It is claimed that the Nevada Commission does not qualify because it is not empowered to fix the rates Mineral County Power System pays to California Electric Power Company. Such contention has no merit. Surely, Congress did not contemplate state commissions with powers beyond those normally entrusted to them, powers which might indeed be found to be unconstitutional.

Turning to the second condition in Section 20, viz., that the states must not be unable to agree, there was no evidence whatever to indicate that California and Nevada "through their properly constituted authorities" were "unable to agree." No evidence whatever was offered respecting any course of dealing, or an absence thereof, between the California and Nevada commissions, or between any other authorities of the respective states. [fol. 37] The Chairman of the Nevada Public Service Commission stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He further stated:

"The State of Nevada, therefore, is not interested except to the extent that the users are living in Nevada and, therefore, I will say that we are very much interested. I am not prepared to state at this time

what the position of our Commission would be, until after this matter of jurisdiction has been decided. That is all the statement I wish to make."

These words make apparent that there was no inability to agree, and that the Nevada Commission has adopted a neutral position.

It follows that, since neither of the circumstances prevailed upon which Federal Power Commission jurisdiction is conditioned under Section 20, jurisdiction could properly be exercised by the California Commission over the sales to Mineral County Power System.

See First and Second *Safe Harbor* cases, *supra*.

2. *The Effect of Part II of the Federal Power Act*

It was observed in discussing the sales to the Navy that Part II gives the Federal Power Commission jurisdiction only over sales "to any person for resale." The sales [fol. 38] to Mineral County Power System undoubtedly are "for resale" but they are not sales to a "person." Section 3(4) defines a "person" as "an individual or corporation." A "corporation" by Section 3(3) "shall not include 'municipalities' as herein defined." A "municipality" by Section 3(7) means "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power . . ." Mineral County Power System, as we understand it, is the operating name for the County of Mineral in its proprietary capacity as the seller of electric energy at retail. Thus, it is a "municipality" as defined in Section 3(7) and, therefore, is excluded from the definition of a "corporation" in Section 3(3) and from the definition of a "person" in Section 3(4). It follows that Part II does not apply to the sales to Mineral County Power System.

Even if the sales to Mineral County Power System were to be regarded to be within the purview of Part II, the proviso clauses of Sections 201(a) and 201(b) apply. The views heretofore stated respecting them apply with equal force. Since by the provisions of Part I, Section 20, the

California Commission upon the facts may exercise jurisdiction, the proviso clauses in Part II operate to insure that jurisdiction by denying it to the Federal Power Com-
[fol. 39] mission.

We have developed at some length the reasoning underlying the California Commission's conclusion that it had jurisdiction to regulate the rates for the sales to the Navy and Mineral County Power System. We turn now to the second contention made by both petitioners, viz., that it was error to issue a decision in square conflict with the Federal Power Commission's opinion.

III. The California Public Utilities Commission Was Not Precluded from Rendering a Decision Based Upon Its Own Interpretation of the Federal Constitution and a Federal Statute Merely Because a Federal Power Commission Decision Taking a Contrary Position Was Currently Before a Federal Court of Appeals on Petition for Review.

Petitioners do no more than make the flat assertion that it was error for the California Commission to issue a decision in conflict with a Federal Power Commission decision currently under review. No reason is assigned for such position and no authorities are cited.

If petitioners mean to indicate that, where the construction of the Federal Constitution or a federal statute is in issue, a state tribunal must defer to a federal tribunal whenever a proceeding has been begun in the latter, they forget that the laws of the United States are as binding on citizens and courts as state laws. State tribunals have
[fol. 40] equal jurisdiction with federal tribunals to construe federal law and determine whether that law confers concurrent jurisdiction or exclusive jurisdiction upon one or the other of such tribunals. *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119. In *Grubb* v. *Public Utilities Commission of Ohio* (1930), 281 U. S. 470, 74 L. ed. 972, the United States Supreme Court said:

> "The appellant relies on the commerce clause as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of

> all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation . . . and is in conflict with the doctrine often sustained by this court that the states have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law confers jurisdiction.

Grubb v. *Public Utilities Commission of Ohio* (1930), *supra.*

Minneapolis & St. L. R. R. v. *Bombolis* (1916), 241 U. S. 211, 60 L. ed. 961.

Robb v. *Connolly* (1884), 111 U. S. 624, 28 L. ed. 542.

[fol. 41] The state court may not decline to exercise jurisdiction merely because it would be inconvenient or confusing to handle a case involving rights under a federal statute.

Gerry of California v. *Superior Court, supra.*

Mondou v. *New York, New Haven & Hartford R. R.* (1912), 223 U. S. 1, 56 L. ed. 327.

In the *Gerry of California* case, this Court said (32 Cal. 2d 119 at 122:

> "Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The state and federal tribunals may proceed until a final judgment of one becomes conclusive on the other as *res adjudicata.*

Grubb v. *Public Utilities Commission, supra.*

In short, petitioners' contention is without merit.

IV. The California Commission Was Fully Warranted in Concluding That Its Earlier Rate Decision, Decision No. 41798, Should Be Construed to Apply to the Sales by California Electric Power Company to the Navy.

The United States contends that it was error for the California Commission to construe its earlier Decision No. 41798 as applying to the sales to the Navy. Such con- [fol. 42] tention to be meritorious would have to be based upon the premise that there was no evidence in the record in the earlier proceeding and no statement in the earlier decision itself which could reasonably form the basis for concluding that the sales to the Navy were intended to be covered in the rate order. Quite aside from the fact that the Commission is in the best position to know what it intended in issuing the earlier rate order, there was clearly ample evidence in the earlier proceeding to justify a rate order extending to the sales to the Navy, and, furthermore, the language of that earlier decision is reasonably susceptible of the interpretation given it. The Court's attention is respectfully invited to the discussion of this matter beginning at the bottom of Sheet 3 of Decision No. 45913 (the decision here under attack).

V. The Charge That the California Commission Did Not Give Full Recognition Or Effect to the Nevada Statutes Is Unwarranted.

Mineral County in its petition for a writ incorporates by reference its petition for rehearing, on page 2 of which it is contended that the California Commission did not give effect to the following language in the Nevada statutes:

> "Section 2. The board of county commissioners . . . shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either with or without the State of Nevada, for the purchase of electric energy or current . . ."

[fol. 43] Mineral County contends that such language excludes the Nevada Public Service Commission from exercising jurisdiction over Mineral County Power System notwithstanding the language in Section 16, page 55 of Nevada Statutes of 1925 giving that Commission jurisdiction over the rates charged by the Power System. (See quotation from Nevada Statutes, page 22 above.) We are at a loss to follow the thread of petitioner's reasoning. It appears to be a *non sequitur*.

Conclusion

It is respectfully submitted that neither the United States nor Mineral County, Nevada, has shown cause for the issuance of a writ herein. Their petitions should, therefore, be denied.

It is submitted that this Court should, for the reasons previously given, act upon the petitions herein without awaiting disposition of the proceeding before the Court of Appeals for the Ninth Circuit.

Respectfully submitted, (S.) Everett C. McKeage, Boris H. Lakusta, Wilson E. Cline, Attorneys for the Public Utilities Commission of the State of California.

Dated: San Francisco, California, October 8, 1951.

[fol. 44] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18463

THE UNITED STATES OF AMERICA, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one [fol. 45] years, and neither a party to nor interested in the above proceeding.

That on the 8th day of October, 1951, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within Answer to Petitions for Writ of Review, addressed to the following attorneys:

James R. Browning, Esq.,
Acting Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

L. E. Blaisdell, Esq.,
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.,
c/o California Electric Power Co.,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D. C., Hawthorne, Nevada, and Riverside, California, respectively.

Grace E. Hunt.

Subscribed and sworn to before me this 8th day of October 1951. (S.) R. J. Pagalich, Secretary, Public Utilities Commission of the State of California. (Seal.)

[fol. 46] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER OF CALIFORNIA ELECTRIC POWER COMPANY TO PETITION FOR REVIEW—Filed October 8, 1951

California Electric Power Company, a corporation, Respondent above named, for answer to the Petition for Writ of Review, states:

I

This Respondent denies each and all of the allegations of paragraph VII of the Petition herein, including exhibit A thereto attached.

II

This Respondent avers that, as found by Federal Power Commission in its Order of April 13, 1951, mentioned in the Petition herein, this Respondent is a licensee under Part I of Federal Power Act (Secs. 1-29; 16 U. S. Code, Secs. 791-823) and holds licenses for five projects consisting of seven hydro-electric power plants located in Mono and Inyo

Counties, California, all of which Respondent owns and operates as a public service corporation and in developing, transmitting and distributing power for sale and use [fol. 47] in public service, and that part of the electric energy generated in each and all of said projects is sold and delivered to Petitioner at Respondent's Mill Creek Plant in Mono County, California, and is transmitted by Petitioner from said Mill Creek plant into Mineral County, State of Nevada, solely over and by means of a transmission line owned, maintained, and operated by the Petitioner between said points.

III

Section 19 of Federal Power Act (16 U. S. Code, Sec. 812) provides in effect that, as a condition of all such licenses, every licensee which is a public service corporation or corporation owning or operating any such project and developing, transmitting or distributing power for sale or use in public service shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power and of rates and charges of payment therefor as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case such State has not authorized or empowered a commission or other agency to regulate such services and rates, jurisdiction is conferred upon Federal Power Commission to exercise such regulation until such state shall have provided such Commission or authority for such regulation, and that such jurisdiction of Federal Power Commission shall cease and determine as soon as such state shall have provided such commission.

IV

The provisions of said Section 19 are expressly incorporated in each of this Respondent's said licenses and is a contractual arrangement between the United States and Petitioner founded upon an adequate consideration and [fol. 48] is immune from impairment under Amendment V to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

V

The State of California has and, at all times herein mentioned, had authorized and empowered a commission (Public Utilities Commission, Respondent herein) within said State to regulate services and rates of this Respondent as provided in said Section 19 of Federal Power Act, and said Commission has, at all times herein mentioned, regulated this Respondent's services and rates in accordance with the Public Utilities Act of said State (Deering's G. L. Act 6386).

VI

Section 20 of said Federal Power Act (16 U. S. Code, Sec. 813) provides in effect that, when said power or any part thereof shall enter into interstate commerce, the rates charged and the service rendered by such licensee shall be reasonable, non-discriminatory and just, and that whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this Section within such State, or such States are unable to agree through their properly constituted authorities, jurisdiction is conferred upon Federal Power Commission to enforce the provisions of this Section and to regulate so much of services and rates as constitute interstate commerce.

VII

Section 6 of said Federal Power Act (16 U. S. Code, Sec. 799) operates so as to incorporate the provisions of said Section 20 of said Act as a contractual provision of all of this Respondent's said licenses, which is based upon an [fol. 49] adequate consideration and is immune from impairment under Amendment V to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

VIII

The States of California and Nevada are the only States which are directly concerned in the matters referred to in the Petition herein or in said Section 20 and each of said States has provided a Commission to enforce the provisions of said Section 20 within such states (Deering's G. L. Act

6386; Nev. Comp. L. 1929, Secs. 6100, et seq.), and there is no allegation in said Petition that said States are unable to agree as provided in said Section 20 of Federal Power Act.

IX

The rates of this Respondent referred to in the Petition herein are not subject to regulation by Federal Power Commission under Part II of Federal Power Act (Secs. 201-209; 16 U. S. Code, Secs. 824-824h) for the following reasons:

(a) The rate regulatory features of Part II of Federal Power Act (Secs. 201, 205 and 206; 16 U. S. Code, Secs. 824, 824d and 824e) do not apply to licensees under Part I of said Act for the reason that regulation thereof is vested in State Commission or Commissions under Sections 19 and 20 of said Act as contractual stipulations between the United States and the licensees, including this Respondent.

(b) Under Sec. 201 of Federal Power Act (16 U. S. Code, Sec. 824), Federal Power Commission has jurisdiction only over rates for the transmission of electric energy in interstate commerce and for the sale of energy at wholesale (for resale) in interstate commerce, and neither the rates [fol. 50] nor sales mentioned in the Petition herein are in interstate commerce as defined in said Sec. 201.

(c) Such sales are not sales in interstate commerce, for the reason that under Section 201(f) of said Act, none of the provisions of Part II of said Act apply to a state or any political subdivision, agency, authority or instrumentality of a state, and, hence, the definition of interstate commerce in Sec. 201(c) of said Act does not apply to the Petitioner herein, which is not and cannot be engaged in interstate commerce as defined in Part II of said Act;

(d) Such sales to Petitioner are not sales at wholesale as defined in Sec. 201(b) and (d) of said Act, for the reason that they are not made to a "person" as defined in Sec. 3(3), (4) and (7) of said Act.

X

Federal Power Commission has no jurisdiction of said rates or sales, for the reason that Sec. 201(b) of said Act

exempts therefrom rates and sales in local distribution and Petitioner is simply and only a distribution customer on Respondent's 55 kv system used in the local distribution of electric energy in Mono County, California.

Wherefore, this Respondent prays that the Petition herein be dismissed.

(S.) Henry W. Coil H. M. Hammack, Donald J. Carman, Kenneth M. Lemon, Attorneys for Respondent, California Electric Power Company.

[fol. 51] *Duly sworn to by G. C. Delvaille. Jurat omitted in printing.*

[fol. 52] STATE OF CALIFORNIA,
County of Riverside, ss.

RUTH WARREN, being first duly sworn, on oath deposes and says: that she is a citizen of the United States, a resident of the City of Riverside, County of Riverside, State of California, over the age of twenty-one years, and not a party to the within named cause; that affiant's business address is 3771 Eighth Street in said City of Riverside; that on the 28th day of September, 1951, affiant deposited in the United States mail in said City of Riverside, true copies of the within Answer, enclosed in sealed envelopes with all postage thereon fully prepaid, addressed, respectively as follows:

James R. Browning,
Acting Assistant Attorney General,
Washington, D. C.
Paul A. Sweeney, Attorney,
Department of Justice,
Washington, D. C.
Public Utilities Commission of California,
State Building,
San Francisco 2, California.
L. E. Blaisdell,
District Attorney,
County of Mineral,
Hawthorne, Nevada.

That there is a regular communication by mail between said place of mailing and said places so addressed.

Ruth Warren.

Subscribed and sworn to before me this 28th day of September, 1951. Leon S. Heseman, Notary Public in and for the County of Riverside, State of California. My Commission Expires August 3, 1953. (Seal.)

[fol. 53] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

REPLY TO ANSWERS TO PETITION FOR REVIEW—Filed October 29, 1951

The County of Mineral joins with the Public Utilities Commission in that part of its statement relative to the two petitions for review herein, which appears on lines 4 to 5 page 2 of its answer, namely, that

> "The same basic argument dominates both petitions, viz., that the California Commission was without authority to render the decision it did . . ."

However, the County of Mineral urges other reasons for that argument, in addition to those mentioned by the Commission, which follow:

All of the parties hereto participated in the proceedings before the Federal Power Commission which resulted in [fol. 54] the final decision of that Commission determining jurisdiction to rest with it, and denying jurisdiction to the California Commission. The California Electric Power Company has petitioned the Ninth Court of Appeals for a review of that decision, which is pending, and a stay order has been granted and is in effect. The California Commission has not so petitioned and, we contend, the decision of the Federal Power Commission referred to is *res adjudicata* as to the California Commission pursuant to Section 313 (a) of the Federal Power Act (16 U. S. C. 8251 (a)), since that Commission did file briefs and petition for re-

hearing complaint with its provisions. As a result, we urge, the California Commission was precluded from making its decision and orders in conflict with those of the Federal Power Commission.

Mineral County has petitioned this Court for a writ of review of the California Commission's decision on the theory that such action was necessary to safeguard its rights until the proceedings before the Ninth Court of Appeals has been finally settled. The County has been granted leave to intervene in that proceeding and intends to participate and follow through to a determination of the issues presented. We respectfully pray that this Court with-hold action on the petitions here under consideration [fol. 55] in the meantime and thus eliminate great and, we suggest, unnecessary duplication of effort on the part of all parties concerned. We respectfully ask, further, that this reply be accepted by the Court as a reply to the answer of California Electric Power Company.

Respectfully submitted, (S.) L. E. Blaisdell, Attorney for Mineral County.

Dated October 27th, 1951.

[fol. 56] AFFIDAVIT OF SERVICE

STATE OF NEVADA,
County of Mineral, ss.

DELLA SCHMIDT, being first duly sworn, deposes and says; That affiant is, and at all times herein mentioned was a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 27th day of October, 1951, in the City of Hawthorne, County of Mineral, affiant personally deposited in the United States Mail copies of the within Reply to Answers to Petition for Review, addressed to the following attorneys:

Everett C. McKeage, Esquire,
c/o Public Utilities Commission
of the State of California,
San Francisco 2, California.

Henry W. Coil, Esquire,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorney for Mineral County has his office in the City of Hawthorne, County of Mineral. That there is a regular communication by mail between the City of Hawthorne, County of Mineral, State of Nevada, and City and County of San Francisco, California, and Riverside, California, respectively.

(S.) Della Schmidt.

Subscribed and sworn to before me this 27th day of October, 1951. (S.) J. J. Connelly, Notary Public, State of Nevada. My Commission expires: June 10, 1954. (Seal.)

[fol. 57] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE COUNTY OF MINERAL, STATE OF NEVADA, ETC.,

v.

THE PUBLIC UTILITIES COMMISSION, ETC., ET AL.

ORDER DENYING WRIT OF REVIEW—Filed January 21, 1952

Petition for writ of review Denied.

Gibson, C. J. Carter, J. and Spence, J., voting for issuance of a writ.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 58] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF REVIEW—Filed February 4, 1952

The County of Mineral, by its official counsel, L. E. Blaisdell, respectfully petitions this Honorable Court for rehearing of the court's denial of the petition for writ of review in the above entitled proceeding.

The denial of the writ leaves the order of the Public Utilities Commission, entered July 3, 1951, standing, and if the County's petition for the writ is not reheard by this Honorable Court, Mineral County will be left bound by the California Commission's order which is in direct conflict with the Federal Power Commission's earlier order of April 13, 1951. If the latter order is affirmed in the Court [fol. 59] of Appeals for the Ninth Circuit, review of which is pending, and in which the County is a party, the County will be subject to conflicting requirements, that is to say, it will be required to pay one rate under the California Commission's order and will be entitled to another rate under the Federal Power Commission's order, both of which are legal rates and legally binding on the County and must be charged and paid subject to penalty.

The California Commission by its order directs respondent company to charge to and collect from Mineral County one rate and if the Ninth Circuit affirms the Federal Power Commission's order entitling the County to a different rate both the respondent company and the County will be in a dilemma as to where jurisdiction rests. Further litigation may be required on problems arising from this situation, which will not arise if our prayer for a writ of review is granted and decision withheld pending determination of the issues in the Ninth Circuit.

Wherefore, the County of Mineral prays this Honorable Court to grant this petition and to let the writ of review issue, or that action hereunder be withheld until the Ninth Court of Appeals has rendered its decision in California

Electric Power Company vs. Federal Power Commission, No. 12987.

Dated February 1, 1952.

Respectfully submitted, (S.) L. E. Blaisdell, District Attorney and Attorney for Mineral County.

[fol. 60] *Duly sworn to by L. E. Blaisdell. Jurat omitted in printing.*

[fol. 61] AFFIDAVIT OF SERVICE

STATE OF NEVADA,
County of Mineral, ss.

ELIZABETH WILKINSON, being first duly sworn, deposes and says: That affiant is, and at all times herein mentioned was a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 1st day of February, 1952, in the City of Washington, D. C., affiant personally deposited in the United States Mail copies of the within Petition for Rehearing, addressed to the following attorneys:

Everett C. McKeage, Esquire,
c/o Public Utilities Commission of the State of California,
San Francisco, 2, California.

Henry W. Coil, Esquire,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorney for Mineral County has his office in the City of Hawthorne, County of Mineral. That there is a regular communication by mail between the City of Hawthorne, County of Mineral, State of Nevada, and City and County of San Francisco, California, and Riverside, California, respectively,

as well as between Washington, D. C., and the City of San Francisco.

(S.) Elizabeth Wilkinson.

Subscribed and sworn to before me this 1st day of February, 1952. (S.) Wayne Birdsell, Notary Public, District of Columbia. My Commission expires April 14, 1953. (Seal.)

[fol. 62] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

ANSWER TO PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF REVIEW—Filed February 8, 1952

This Court on January 21, 1952, denied petitions for writ of review sought by the United States and Mineral County, Nevada, herein.

[fol. 63] The two petitioners have now served and filed in this Court petitions for rehearing, seeking that writs of review as originally prayed be granted and that the issues be determined "on the briefs and oral arguments," or in the alternative that "action on this petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion . . ."

Neither petitioner presents any sound reason for the relief prayed, nor any new matter. Each points to the decision of the California Public Utilities Commission as being in conflict with that of the Federal Power Commission and suggests that the utility California Electric Power Company may be faced with penalties or fines because of

ir ability to obey conflicting orders. No argument is made on the merits.

It is submitted that the petitions for rehearing reveal a misunderstanding of the law in a number of respects.

A. *Effect of Denial of Writ of Review*

In seeking a determination of the issues "on the briefs and oral arguments" and in suggesting that such course will obviate the "need for relitigating the issue as to jurisdiction," the petitioners evince ignorance of the effect of this Court's denial of a writ of review. Such denial constitutes an affirmance of the Commission's decision on the merits. As this Court stated in *Southern California Edi-* [fol. 64] *son Co.* v. *Railroad Commission* (1936), 6 Cal. 2d 737, at 748:

> "... it should be observed that under the State Constitution and the Public Utilities Act, the powers of this court in a proceeding to review an order or decision of the commission are not limited to the considerations incident to the writ of *certiorari* or review mentioned and provided for in section 4 of Article VI of the Constitution and sections 1067-1077 of the Code of Civil procedure."

Again, on page 756, this Court said:

> "... The denial of the petition for a writ of review in each case must be deemed a determination of the point ..."

In *Napa Valley Electric Co.* v. *Railroad Commission* (1920), 251 U. S. 366, 64 L. ed. 310, the United States Supreme Court said, in referring to the effect of a denial by the California Supreme Court of a writ to review an order of the Commission (251 U. S. at 373):

> "... absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented..."

To like effect is *Southern Pacific Co.* v. *Van Hoosear* (1934), 72 F. 2d 903.

B. *Concurrent Jurisdiction of California Supreme Court*

While petitioners do not expressly say so, they create the implication that this Court should be subservient to the determination of a federal administrative agency and should await the outcome of a federal court review of [fol. 65] such determination. As shown in our Answer to the Petitions for Writs of Review herein (pp. 26-28), state tribunals have equal jurisdiction with federal tribunals to construe federal law and determine whether that law allows concurrent jurisdiction in the state and federal tribunals, or whether it gives exclusive jurisdiction in the federal tribunal. To repeat the language of this Court in *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119, 122:

> "... Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law permits state jurisdiction.

> See *Grubb* v. *Public Utilities Commission* (1930), 281 U. S. 470, 74 L. ed. 972.

Indeed, in that case it was held that the decision of the state court, once final because of expiration of the period for appeal to the United States Supreme Court, estopped the appellant from further litigation in the federal court. [fol. 66] C. *Effect of Delay in Acting upon Petition for Rehearing*

As an alternative to the issuance of a writ of review, petitioners ask that action on the petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion in the cognate proceeding. Ap-

parently, petitioners are unfamiliar with this Court's Rule 27(e) which provides:

> "If no order [on petition for rehearing] is made before the decision becomes final, the petition shall be deemed denied."

Petitioners could hardly have intended to make the alternative request.

D. *Effect of California Supreme Court Decision Upon California Electric Power Company*

The United States argues that the petition for rehearing should be granted because the utility will otherwise be caught between conflicting orders, with the possibility of incurring fines and penalties. There are two answers. First, it is hardly befitting the United States to appropriate an argument which belongs to the utility only. Secondly, the record in the proceeding before the Court of Appeals, Ninth Circuit (No. 12987), reveals that a stay order was issued by that Court on August 29, 1951. The argument of the United States indicates that its counsel have not bothered to ascertain the state of the record.

[fol. 67]

Conclusion

In view of the foregoing, it is submitted that the petitions for rehearing should be denied.

Respectfully submitted, (S.) Everett C. McKeage, Boris H. Lakusta, Wilson E. Cline, Attorneys for the Public Utilities Commission of the State of California.

Dated: San Francisco, California, February 8, 1952.

[fol. 68] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18463

THE UNITED STATES OF AMERICA, Peitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one [fol. 69] years, and neither a party to nor interested in the above proceeding.

That on the 8th day of February, 1952, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within Answer to Petition for Rehearing of Denial of Petition for Writ of Review, addressed to the following attorneys:

Holmes Baldridge, Esq.,
Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

L. E. Blaisdell, Esq.,
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D. C., Hawthorne, Nevada, and Riverside, California, respectively.

(S.) Grace S. Hunt.

Subscribed and sworn to before me this 8th day of February, 1952. (S.) R. J. Pagalich, Secretary, Public Utilities Commission of the State of California. (Seal.)

[fol. 70] ORDER DUE FEBRUARY 20, 1952

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE COUNTY OF MINERAL, STATE OF NEVADA, ETC.,

v.

THE PUBLIC UTILITIES COMMISSION, ETC., ET AL.

ORDER DENYING REHEARING

Petition for rehearing Denied.

Gibson, C. J., Carter, J., & Spence, J., voting for a rehearing.

Gibson, Chief Justice.

Filed February 18, 1952, William I. Sullivan, Clerk, By R. J. Bell, S. F., Deputy. (Seal.)

[fol. 71] Clerk's Certificate to foregoing transcript

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1952.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 1st day of May, 1952.

[fol. 73] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 206

COUNTY OF MINERAL, NEVADA, a Political Subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and the California Electric Power Company, a Corporation

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
JUL 16 1952
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SUPREME COURT, U.S.

No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered in the above-entitled case on January 21, 1952, denying a writ to review the order of the Public Utilities Commission of the State of California, entered on July 3, 1951.

OPINIONS BELOW

The opinion of the Public Utilities Commission (R. 6-19) is reported at 50 Cal. P. U. C. 749. The Supreme Court of the State of California rendered no opinion.

JURISDICTION

The order of the Supreme Court of the State of California denying a writ of review was entered on January 21, 1952 (R. 68). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 74). By order of Justice Douglas, dated April 17, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), on the ground that the decision of the Supreme Court of the State of California denied a title, right, privilege or immunity specifically set up and claimed by the United States under the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.* The cases relied upon to sustain the jurisdiction of this Court are *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U.S. 366, 371-373; *Madera Sugar Pine Company* v. *Industrial Accident Commission of the State of California*, 262 U.S. 499, 500; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *Caldarola* v. *Eckert*, 332 U.S. 155, 158; *United States* v. *Allegheny County*, 322 U.S. 174, 183-184.

Respondent California Electric Power Company applied to respondent Public Utilities Commission of the State of California for a determination whether the P-2 rate schedule prescribed by the California Commission applied to the Company's sale of electric energy to the United States Navy Department's Ammunition Depot in Hawthorne,

Nevada. The United States, appearing through the Navy Department, claimed, both orally and in briefs filed with the California Commission, that, under the Federal Power Act, the California Commission had no jurisdiction over the sale, and that under Part I and Part II of that Act exclusive jurisdiction was in the Federal Power Commission. The same issues were raised in the Government's petition for rehearing filed with the California Commission (R. 20-23). In the State Supreme Court, the United States raised the same questions in its petition for a writ of review (R. 1-5), and in its petition for rehearing from the denial of review (R. 68-69). The court below rejected the Government's contentions and affirmed the order of the California Commission (R. 68, 74).[1]

The questions presented are substantial as is

[1] Under the California practice, the denial by the State Supreme Court without written opinion of an application for writ of review of an order of the Public Utilities Commission constituted "a final adjudication of the correctness and the validity of the decision which it is attempted to have reviewed." *People* v. *Hadley*, 66 Cal. App. 370, 375; see also *Southern California Edison Co.* v. *Railroad Commission*, 6 Cal. 2d 737, 747, 758; *Funeral Directors Ass'n* v. *Board of Funeral Directors*, 22 Cal. 2d 104, 107-108; *McDonough* v. *Garrison*, 68 Cal. App. 2d 318, 325; cf. *Southern Pacific Co.* v. *Van Hoosear*, 72 F. 2d 903, 905 (C.A. 9); *Wallace Ranch Water Co.* v. *Railroad Commission of California*, 47 F. 2d 8, 9 (C.A. 9).

In *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U.S. 366, this Court recognized that "the denial of the petition was necessarily a final judicial determination, * * * the absence of an opinion by the [California] Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented * * *" (251 U.S. at 373).

more fully developed under the reasons for granting the writ (*infra*, pp. 10-25).

QUESTIONS PRESENTED

The ultimate question is whether under the Federal Power Act the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission which is also asserting sole jurisdiction, over the sales of electric energy in California by the California Electric Power Company for use in connection with the Navy Department's Ammunition Depot at Hawthorne, Nevada.

More specifically, the questions presented are:

1. Whether the interstate sale to the Navy is a "sale of electric energy to any person for resale" subject to federal rather than state regulation under Part II of the Federal Power Act, where (a) the Navy's resales are to the tenants of its housing development and to business concessions on the naval reservation and (b) a substantial part of the energy so furnished by the Company is generated at hydro-electric projects licensed under Part I of the Act.

2. Whether, since the Navy's purchases and sales are not subject to regulation by Nevada, California is the only "state directly concerned" with the sales of electric energy by the Company to the Navy, within the meaning of Section 20 of Part I of the Federal Power Act, and, hence, has independent rather than coordinate jurisdiction with

Nevada over the Company's rates for these interstate sales of electric energy to the Navy.[2]

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) appear in the pamphlet copy of the Act submitted with this petition.

STATEMENT

Respondent California Electric Power Company (Company) is engaged in the business of generating and distributing electric energy in the States of California and Nevada (R. 1, 7). It renders public utility service in several counties in southeastern California and its Nevada Division serves parts of Nye and Esmeralda counties, Nevada (R. 7).

Since July 1, 1943, the Company has been selling to the Navy Department, under contract, electric energy required "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada" (R. 2, 10, 45). A large percentage of the energy so furnished is generated at the Company's hydroelectric projects licensed under Part I of the Federal Power Act; at times, however, all or a portion of the energy comes from non-licensed sources and other electric production agencies with which

[2] The United States reserves the right, should the questions be reached, to urge that Section 20 of Part I does not pertain to sales for resale in interstate commerce, and further, that, if it does, it is *pro tanto* repealed by implication by Part II.

the Company maintains interconnections (R. 2, 11, 45). Irrespective of where generated, the energy sold to the Navy is transmitted at 55,000 volts to the Company's substation at Mill Creek in California, where it is delivered to the Navy (R. 2, 11, 45). The Navy in turn transmits the energy over its own 55,000 volt line across the California-Nevada state boundary to Hawthorne, Nevada, where it is reduced to distribution voltage (R. 2, 8). The Navy's transmission line is approximately 55 miles in length, about one-half being in California and the other half in Nevada (R. 8).

At Hawthorne, in addition to using the energy purchased from the Company for the power and energy requirements of its industrial activities, the Navy furnishes a substantial part thereof to the tenants of the Naval personnel's quarters ("public quarters"), as well as to tenants of the "Navy Low-Cost Housing Project" (known as Babbitt) which provides living quarters and facilities for civilians connected with the Depot (R. 2, 11, 46). The Navy makes a separate charge to each of the tenants of these living quarters and business concessions for the electric energy furnished them (R. 2, 46). Residence or operation of business concessions at Babbitt is permitted only so long as it is consistent with the Navy's obligations. The lease agreements with the occupants of the "public quarters" and of Babbitt provide that the rental privilege ceases upon termination of employment; for the business concessions, the Navy

issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 14-15).

By decision dated July 1, 1948, respondent Public Utilities Commission of the State of California (California Commission) authorized a general rate increase for the Company to be effective August 1, 1948, and in connection therewith prescribed special schedules, including a so-called "Schedule P-2-Power-Wholesale General Service," to replace a substantial number of special rate contracts, with which the Commission was dissatisfied (R. 2, 7, 8-9). On July 30, 1948, the Company sought to terminate its contract with the Navy and to apply, as of October 1, 1948, the P-2 Schedule to its sales to the Navy (R. 2, 9). Thereafter, in August 1948, the Company applied to the California Commission for a ruling whether the P-2 Schedule was applicable to these sales since the Navy was claiming, among other things, that the California Commission did not have jurisdiction to prescribe the rates to be paid by it (R. 2, 6-7).

A hearing on this application was held by the California Commission on October 7, 1949 (R. 3, 7). That Commission also scheduled further hearings but took them off its calendar when the Federal Power Commission (Federal Commission) indicated, through correspondence, a desire to explore the question of jurisdiction (R. 7). The Federal Commission, on February 15, 1950, issued an order to the Company to show cause why the Company's

sales to the Navy were not subject to its jurisdiction under the Federal Power Act, and thereafter, pursuant to mutual agreement between the two commissions, concurrent hearings were held on March 20 and 21, 1950, on the jurisdictional questions involved (R. 3, 7).

On April 13, 1951, the Federal Commission issued its opinion and order, holding that under the Federal Power Act it had exclusive jurisdiction over the Company's sales to the Navy and directing the Company to file the 1943 contract as a rate schedule and to charge the rate specified until or unless duly superseded by new rates filed in accordance with the Federal Commission's Rules and Regulations (R. 24-41). Opinion No. 212 in F.P.C. Docket No. E-6269; *Re California Electric Power Company,* 89 PUR (NS) 359. On June 5, 1951, the Federal Commission denied applications for rehearing filed by the Company and the Legal Department of the California Commission, and on June 20, 1951, the Company filed a petition for review of the Federal Commission's order in the Court of Appeals for the Ninth Circuit, as authorized by Section 313(b) of the Federal Power Act. *California Electric Power Company* v. *Federal Power Commission,* C.A. 9, No. 12987. (The United States has intervened in this proceeding in support of the Federal Commission's order.) [3]

[3] All briefs have been filed in this case, including a brief *amicus curiae* submitted by the California Commission, and oral argument was had on August 4, 1952.

Thereafter, on July 3, 1951, the California Commission issued its order and opinion in which it concluded, on substantially the same record, that notwithstanding the Federal Commission's ruling, it, rather than the Federal Commission, had exclusive jurisdiction over these sales. According to the California Commission, regulation by it was not precluded either by the Commerce Clause or the Federal Power Act, even if it be assumed that the sales were in interstate commerce (R. 11). In reaching this conclusion, the California Commission ruled that Nevada, not having authority over the Navy's purchases or sales of electric energy, was not "directly concerned" with the Company's sales to the Navy within the meaning of Section 20 of the Power Act's Part I, and consequently, since the California Commission was the kind of state "commission or other authority" there contemplated, it had sole jurisdiction over a sale under that Section (R. 11-12, 13-14).

The California Commission went on to hold that this jurisdiction was not ousted by the Federal Commission's authority under Part II of the Federal Power Act. While admitting that "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), the Commission applied Section 3's definition of "person" (which does not include the United States) to Section 201(d)'s definition of wholesale sale ("sale * * * to any person for resale") and concluded that Part II was inapplicable to such sales to the United States

(R. 14). In addition, it held that "sale for resale", as used in Part II, embraces only sales for resale to companies engaged in the public utility business, and not sales to tenants of the reseller (R. 14-15). Finally, the Commission ruled that, since these sales were regulable by the State under Section 20 of Part I, federal regulation under Part II was precluded by Section 201(a) and (b) of the Act (R. 15-16).

The State Supreme Court (three judges dissenting) denied the Government's petition, filed in accordance with Section 67 of the Public Utilities Act of California (now Public Utilities Code, Sections 1756-1760),[4] and affirmed without opinion (R. 68).

REASONS FOR GRANTING THE WRIT

This case raises important questions under the Federal Power Act as to the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy in inter-

[4] In so far as here pertinent, Section 67 provides:

> Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. * * * No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

state commerce.[5] The California Commission, by reading the Act to vest it with exclusive jurisdiction over the Company's sales to the Navy, has reached a conclusion squarely in conflict with that reached by the Federal Commission in its order pending for review in the Ninth Circuit (see *supra* p. 8).[6] Not only does the California Commission's ruling result in mutually incompatible assertions of exclusive jurisdiction over the same sale, but it improperly infringes upon the area subjected by Congress to federal regulation. For one of the principal grounds on which the California Commission justified its claim of jurisdiction has been specifically rejected as unsound by this Court in *Pennsylvania Water & Power Co.* v. *Federal*

[5] While the California Commission merely assumed that the sale was interstate in nature, it is well-established that where, as here, the sale is made to one who transmits the energy across state boundaries, the sale is in fact in interstate commerce as defined both by the courts and in Section 201(c) of the Power Act. See, *e.g.*, *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61. See also *infra*, p. 16, fn. 15.

[6] The California Commission's General Order No. 96, authorizing utilities to furnish electric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments" (R. 12); does not, in the circumstances of this case, make this conflict academic. The Company is seeking to charge the Navy the full P-2 rate sanctioned by the California Commission's order here involved. The Federal Commission has, on the other hand, directed the Company to file the 1943 Navy contract as a rate schedule and to charge no more than the rate there specified until duly superseded. Inasmuch as the contract rate is different and lower than the P-2 schedule rate, the Company cannot charge—nor can the Navy pay—the P-2 rate without violation of the Federal Commission's order.

Power Commission, 343 U.S. 414, two others are in conflict with the holding in *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, C.A. 7, Nos. 10475, 10480 (decided June 9, 1952), and the remaining grounds are demonstrably unsound. In view of these conflicts, and the incongruity of assertions of mutually exclusive jurisdiction by the state and federal commissions over the identical transaction, review by this Court is required to correct the error of the California Commission and thereby to restore the balance in the relationship between the states and the federal government in this field.[7]

1. There is no merit to the California Commission's holding that, although "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), the Company's sale to the Navy nevertheless is not a "sale of electric energy at wholesale in interstate commerce" subject to regulation by the Federal Commission under Part II of the Power Act (Section 201(b)). Each of the three grounds on which this holding is predicated is incorrect.[8]

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[7] The Court may deem it desirable to withhold action on this petition until the Ninth Circuit has issued its opinion on the Federal Commission's order pending for review before it, and perhaps until a petition for certiorari is filed in that case or the time therefor has expired. See *supra*, p. 8.

[8] The additional ground advanced by the Company, that the sale was not for resale since resale was not expressly provided for in the contract with the Navy (R. 60), is likewise without substance. The Company does not deny that it knew of the resale and such knowledge is sufficient. See *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 62; *Cf. Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958-960 (C.A. 2), certiorari denied, 319 U.S. 741. More-

(a). The first ground—based on Section 201 (d)'s definition of a wholesale sale as a "sale of electric energy to any person for resale", coupled with Section 3's definition of "person" so as not to include the United States (R. 14)[9]—improperly applies these definitions without regard to their history and purpose. Cf. *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 201, 206. The error in this strictly literal approach is manifest from *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, C. A. 7, Nos. 10475, 10480 (decided on June 9, 1952), in which the Court of Appeals for the Seventh Circuit reached a contrary conclusion. In that case, which involved the closely related situation of sales for resale to a municipality—likewise excluded from Section 3's definition of "person"[10]—the Seventh Circuit, after consideration of the Act's legislative history and purpose, concluded that the "apparent inconsistency was an oversight," "the 'slip' was inadvertent" and the

over, there is nothing in Section 201(b) which makes the Federal Commission's jurisdiction dependent upon the terms used in contractual agreements, which can be phrased to fit the whims or objectives of either party, rather than upon the facts as they exist.

[9] Section 3(4) defines person to mean an individual or corporation. Section 3(3) defines corporation to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined."

[10] The California Commission based its holding that the Company's sales for resale to Mineral County, a municipality, were exempt from regulation by the Power Commission under Part II on the same reasoning (R. 18). We are informed that Mineral County has filed a petition for a writ of certiorari to review these rulings of the California Commission. No. 206, this Term.

congressional intent was "not so to limit the word 'person' as to exclude any one selling electric energy for resale" (slip opinion, pp. 11, 12).

The legislative history of these provisions fully supports the Seventh Circuit's conclusion as against that of the California Commission.[11] As the Federal Commission points out (R. 32-33), that history reveals that "person" was introduced into the definition of "wholesale sale" not for the purpose of limiting the Commission's jurisdiction over wholesale sales, but merely as an incident to a rephrasing of the definition of "wholesale sale" to close an obvious loophole in another aspect of the earlier wording.

The definition of "wholesale sale" in the bill (S. 2796, 74th Cong., 1st Sess.), as it passed the Senate and came to the House, did not contain "person" nor did it exempt sales for resale to the United States, to municipalities, or anyone else

[11] Also supporting this conclusion is the fact that in all cases, including the present case and the *Wisconsin-Michigan* case, in which this question has been raised, the Federal Commission has consistently construed Section 201(d) not to exempt from its jurisdiction any sales for resale in interstate commerce. *Otter Tail Power Company*, 2 F.P.C. 134, 136-140, 33 PUR(NS) 257, 259-269; *Connecticut Light & Power Company*, 3 F.P.C. 132, 144, 44 PUR(NS) 170, 181, affirmed, 141 F. 2d 14 (C.A. D.C.), reversed on other grounds, 324 U.S. 515; *Otter Tail Power Company*, 8 F.P.C. 393; *Wisconsin Power & Light Company*, F.P.C. Opinion No. 215, issued July 12, 1951, pending on petition for review (C.A. D.C.), Nos. 11224, 11225; see, also *City of Los Angeles* v. *The Nevada-California Electric Corp.*, 2 F.P.C. 104, 32 PUR(NS) 193. This consistent interpretation by the agency charged with the administration of the Act is, under well-established principles, entitled to great weight. See, *e.g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549.

because of who he was.[12] As a result of an amendment added without comment on the floor of the Senate (79 Cong. Rec. 8858), "wholesale sale" was defined to extend only to these situations where the energy was "sold for resale after its transmission in interstate commerce or before such transmission if the same is thereafter so transmitted." Since the omission of such sales made in the course of transmission resulted in the proposed legislation's being inapplicable to the very type of sale involved in *Public Utilities Commission* v. *Attleboro Co.*, 273 U.S. 83, the House Committee corrected this defect by adopting the present broad definition of "wholesale sale" and, in so doing, included the word "person" for the first time.

In commenting on the new definition, however, the Committee's report did not stress "person" as would be expected if the aim of its use was thereby to restrict the Commission's jurisdiction. On the contrary, the Committee did not even mention that the sale must be to a "person", but rather stated without qualification that "a 'wholesale' transaction is defined to mean the sale of electric energy for resale * * *" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8). This comment, far from indicating a restrictive view of the Commission's

[12] S. 1725, 74th Cong., 1st Sess., as introduced in the Senate, and S. 2796, the substitute bill reported by the Senate Committee on Interstate Commerce, proposed that the Federal Commission have jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Although at this stage there was no definition of "wholesale sale", the bills in effect defined the phrase by excluding "retail sale of such energy in local distribution."

jurisdiction, makes clear the intent that the Commission should regulate all interstate sales for resale regardless of who the purchaser for resale may be.[13]

In addition, the report nowhere manifested a purpose to exempt any sales for resale, let alone such sales to the United States or municipalities. This is particularly significant, for not only did the report indicate when an exemption was intended[14] but Section 201(f) expressly exempts the United States and municipalities, when sellers for resale, from the provisions of Part II.[15] Had the committee intended also to exempt sales for resale to such governmental bodies by its use of "person", it certainly would have pointed that out. These considerations, plus the further one that the House definition was intended generally

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[13] While the Committee elsewhere described a wholesale sale as a "sale to any person for resale" (*id.* at p. 27), there again "person" was not emphasized, nor was there any indication, such as quotation marks, that "person" was used in the limited meaning of Section 3(3) and 3(4), rather than in its normal all-inclusive sense.

[14] Thus, immediately following the first restatement of the definition of wholesale sales, the report added "'and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce." H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8.

[15] The Company argues from Section 201(f) that Part II's definition of interstate commerce "does not apply to the United States and neither the United States nor its Navy Department is or can be engaged in interstate commerce under Part II of said Act," (R. 63). But the regulation here being imposed is upon the Company and not the United States, and the fact that the sale is to an exempt agency does not deprive it of its interstate character so far as the Company is concerned. *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679, 681, fn. 2; *cf. Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 511-515.

to broaden the Senate definition which it superseded, strongly suggest that "person" in Section 201(d) was not used in the artificially restricted meaning of Section 3(3) and 3(4).[16]

Further buttressing this conclusion is the fact that the contrary position adopted by the California Commission has an unreasonable result not only when applied to municipalities, as the *Wisconsin-Michigan* case demonstrates (slip opinion p. 12), but also when applied to the United States. It is well recognized that Congress established the Federal Power Commission to regulate interstate sales of electric energy for resale for the purpose of protecting the public from exploitation by public utilities. See, *e.g.*, *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610. The effect of the California Commission's construction, however, is to impute to Congress an intent to deny to the Federal Government—of which Congress is a part and whose financial interests are its direct concern—the federal protection which it has provided for non-governmental purchasers whose financial interests are of less immediate concern to it. In addition, this construction presumes a willingness by Congress to remit the financial interests of the Federal Government, but not those of the public generally, to the protection afforded by state regulation, however inadequate it might be. Such an incongruous result clearly warrants a refusal me-

[16] The Conference Committee adopted the House definition without comment. H. Rep. No. 1903, 74th Cong., 1st Sess.

chanically to adhere to the literal definition of the Act. *Lawson v. Suwannee S.S. Co.*, 336 U.S. 198, 201, 206; *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 and cases cited; *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 55.

(b). The rationale of the *Wisconsin-Michigan* case also demonstrates the fallacy in the California Commission's second ground, *i.e.*, that "sale for resale" as used in the Act was intended to be limited to sales of companies in the public utility business and not to extend to sales where, as here, the resale is to tenants of the reseller (R. 14-15). For, as we have just shown, Congress intended that all interstate sales of electric energy for resale be subject to regulation by the Federal Commission without regard to the character of the reseller or of its business.

While it is true, as noted by the California Commission (R. 15), that *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, involved a sale for resale to a public utility and that one of the purposes of the Federal Power Act was to fill the gap in utility regulation revealed by that case, there is nothing in the *Attleboro* case which even suggests that there are separate categories of wholesale sales, with sales to non-public-utilities being regulable by the states. Since the particular reseller in the *Attleboro* case was a public utility, the Court naturally dealt with the problem in those terms, but the clear thrust of the decision was that all wholesale interstate sales were exempt from state regulation. Cf. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*,

332 U.S. 507, 515; *Wisconsin-Michigan Power Company* v. *Federal Power Commission*, *supra*, slip opinion, p. 7.

Nor is there any intimation of any such distinction in the Act or its legislative history. No qualification of "sales for resale" appears in the Act, and none was intended. See *supra*, pp. 14-18. Congress construed the *Attleboro* case as prohibiting state regulation of all interstate wholesale transactions (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7-8), and it was this gap as thus understood which the Power Act was intended to fill. In addition, this Court has repudiated such a distinction by its repeated rulings that the division of regulatory jurisdiction between state and federal governments was "sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517. "Congress occupied only a part of the field. As to sales, only the sale of gas in interstate commerce for resale was covered. Direct sales for consumptive use were designedly left to state regulation." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334; cf. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, 467.[17]

[17] While these cases relate to the Natural Gas Act, the language and purpose of that Act are substantially the same as those of the Federal Power Act.

(c). The third ground, that an interstate wholesale sale of energy generated at a hydroelectric project licensed under Part I is exempt from rate regulation under Part II (R. 15-16), has already been rejected by this Court in *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 418-419. See, also, *Safe Harbor Water Power Co. v. Federal Power Commission*, 179 F. 2d 179 (C.A. 3), certiorari denied, 339 U.S. 957. In *Penn Water*, the Company urged, as the California Commission ruled here, that the provisions of Part II are inapplicable to sales which are subject to potential state regulation under Part I, since Section 201(a) declares that federal regulation shall "extend only to those matters which are not subject to regulation by the States." This Court, however, refused to adopt this construction of Part II, with the comment that "* * * the language of Part II of the Act makes all 'public utilities' subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command" (p. 418). This ruling leaves no doubt that the Company's interstate wholesale sales to the Navy of energy generated at hydroelectric projects licensed under Part I are not exempt, because of their source, from rate regulation by the Federal Commission under the provisions of Part II. It follows that the Federal Commission has jurisdiction over the Company's sales to the Navy to the exclusion of the California Commission. For this Court has al-

ready held, with regard to the parallel Natural Gas Act, that "as to rates to be effective in the future * * * Congress by that Act * * * preempted the regulatory powers over the transportation and sale of natural gas in interstate commerce" (*Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, 466), and that the Federal Commission's jurisdiction is "exclusive," *id.*, at 467.[18]

2. Even if it be assumed, contrary to the foregoing, that the Federal Commission does not have sole jurisdiction over these sales under Part II of the Federal Power Act, the California Commission further erred in holding that Section 20 of Part I vested it with jurisdiction over the Company's sales to the Navy.[19] Section 20 authorizes the Federal Commission to regulate the rates

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[18] See, also, *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498; *First Iowa Coop.* v. *Federal Power Commission*, 328 U.S. 152; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61; *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377; *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119.

[19] While Section 20 is not expressly limited to retail sales in interstate commerce, we think it demonstrable—and we shall so urge, if the question should be reached in the present case—that Section 20 does not extend to interstate sales for resale and, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act. See Brief for Federal Power Commission in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, Nos. 428, 429, October Term, 1951, pp. 124-129, 135-137. This Court did not find it necessary to reach these questions in the *Penn Water* case.

The Company's claim that Section 19, rather than Section 20, is applicable (R. 61-62), fails to recognize the exception carved out of Section 19, by Section 20, for interstate sales.

charged for electric energy generated at hydroelectric projects licensed under Part I of the Act and sold in interstate commerce "wherever any of the States directly concerned has not provided a commission or other authority to enforce [the Section's] requirements * * * within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates and charges of payment therefor, * * *." Far from supporting the California Commission's position, this Section places authority over the sales in this case in the Federal Commission.

(a). Although Section 20 provides for joint regulation by the "States directly concerned," the California Commission ruled that Nevada was not "directly concerned" since it "has no jurisdiction over the rates the Navy pays to [the Company] nor over the rates the Navy charges its personnel and tenants" (R. 11, 13); consequently, the Commission held, its independent action satisfied the conditions of Section 20, inasmuch as it was a "properly constituted authority." But the doctrine of intergovernmental immunity, on which this conclusion is based, no more precludes regulation of the Company's sale to the Navy by Nevada than it does regulation by California. As far as that doctrine is concerned, there is no reason suggested—nor are we aware of any—why California, but not Nevada, would have jurisdiction over this sale, or indeed why California's authority, if any, should be greater than that of Nevada. Intergovernmental

immunity operates with an even hand on both California and Nevada, and, consequently, as far as that Section is concerned, the states' authority to regulate, if they have any, is equal.

But passing intergovernmental immunity, it becomes clear that the Company's sale to the Navy is of concern to Nevada as well as to California. The Company makes other sales of electric energy in Nevada (R. 7, *supra*, p. 5), and the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada, since they are part of the Company's over-all costs and revenues which, of course, affect the rates charged to the other Nevada consumers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334; cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23. Indeed, in these circumstances, Nevada's concern would be greater than that of California, if the latter's sole interest were, as asserted by the California Commission (R. 11), its control over the Company. Cf. *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 184, fn. 2; *Pennsylvania* v. *West Virginia*, 262 U.S. 553. Since it is plain that Nevada's concern with the sale is at least equal to that of California, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised, as attempted here, by the California Commission acting alone.

(b). The statutory conditions prescribed for joint exercise of jurisdiction by California and

Nevada have not been fulfilled and, consequently, Section 20 puts jurisdiction over the sales in the Federal Commission. For while it may be that California has provided in its Commission "a commission or other authority to enforce the [Section's] requirements * * * within such State," Nevada has not provided any such commission or other authority. The Nevada Public Service Commission has no extraterritorial jurisdiction, being limited to public utilities operating within the state (Nev. Comp. L. (1929) § 6106).[20] In addition, it is without authority over sales for resale; Section 6149 of the Nevada Compiled Laws (1929) explicitly provides that in no circumstances shall a seller for resale be deemed to be a public utility or subject to the Commission's jurisdiction.[21]

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[20] In so far as here pertinent, Nev. Comp. L. (1929) § 6106 defines public utility subject to the Commission's jurisdiction as "every corporation * * * that now or hereafter may own, operate or control * * * any plant or equipment, or any part of a plant or equipment *within the state* for the production, delivery or furnishing for or to other persons * * * light, power in any form * * *." (Italics supplied.)

[21] Section 6149 provides:

> § 6149. SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of

Finally, and particularly significant, is the fact that the Nevada Commission has no authority to participate in fixing the joint rate with another state, such as California. Obviously, Nevada has not provided the type of Commission contemplated by Section 20, and this failure operates, by the terms of the statute, to place jurisdiction over the sales to the Navy in the Federal Commission.[22]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada.

[22] Since, as we show in the text, the Federal Power Act vests jurisdiction over the sales to the Navy in the Federal Commission, it becomes unnecessary to reach the California Commission's further holding that state regulation of this sale would not be a burden on interstate commerce, and hence is not precluded by the Commerce Clause. While such a ruling would be pertinent if Congress had not undertaken to provide regulation (cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23, 29-31), it has no relevance where Congress, by the Federal Power Act, has created a comprehensive and effective scheme of dual regulation (cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329) and vested jurisdiction over sales of this type in the Federal Commission. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, at 524.

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No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Public Utilities Commission (R. 6–19) is reported at 50 Cal. P. U. C. 749. The order of the Supreme Court of the State of California denying the writ of review without opinion (R. 68) is reported at 38 Adv. Cal. 323.

JURISDICTION

The Supreme Court of the State of California entered its order denying a writ of review on

January 21, 1952 (R. 68). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 74). By order of Mr. Justice Douglas, dated April 17, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952 (R. 75). The petition for a writ of certiorari was filed on July 16, 1952 and was granted on October 13, 1952 (R. 77). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The ultimate question is whether under the Federal Power Act the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, which also has asserted sole jurisdiction, over the sales of electric energy in California by the California Electric Power Company for use in connection with the Navy Department's Ammunition Depot at Hawthorne, Nevada.

More specifically, the principal questions presented are:

1. Whether the sales are in interstate commerce.

2. Whether the interstate sale to the Navy is a "sale of electric energy to any person for resale" subject to federal, rather than state, regulation under Part II of the Federal Power Act, where (a) the Navy's resales are to the tenants of its housing development and to business concessions on the naval reservation and (b) a substan-

tial part of the energy so furnished by the Company is generated at hydroelectric projects licensed under Part I of the Act.

3. Whether, since the Navy's purchases and sales are not subject to regulation by Nevada, California is the only "state directly concerned" with the sales of electric energy by the Company to the Navy, within the meaning of Section 20 of Part I of the Federal Power Act, and, hence, has independent rather than coordinate jurisdiction with Nevada over the Company's rates for these interstate sales of electric energy to the Navy.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791a *et seq.*) are set out in Appendix A, *infra*, pp. 74–82.

STATEMENT

Respondent California Electric Power Company (hereafter termed Company) is engaged in the business of generating and distributing electric energy in the States of California and Nevada (R. 1, 7). It renders public utility service in several counties in California, and its Nevada Division serves parts of Nye and Esmeralda counties, Nevada (R. 7).

Since July 1, 1943, the Company has been selling to the Navy Department, under contract, electric energy required "for use of the Government's

Naval Ammunition Depot, Hawthorne, Nevada" (R. 2, 10, 45). In addition, since 1936—and most recently under a three-year contract dated October 5, 1945—the Company has been selling energy to Mineral County, Nevada, petitioner in No. 206, a municipally owned utility, which resells the energy so purchased to its retail customers in Nevada (R. 8, 9, 26).

A large percentage of the energy so furnished to the Navy and Mineral County is generated at the Company's hydroelectric projects located in California, which projects are licensed by the Federal Power Commission under Part I of the Federal Power Act; at times, however, all or a portion of the energy comes from non-licensed sources and other electric production agencies within California with which the Company maintains interconnections (R. 2, 11, 45). Irrespective of where in California it is generated, the energy sold to the Navy and Mineral County is transmitted at 55,000 volts to the Company's Mill Creek substation in California, where it is delivered to the Navy and Mineral County (R. 2, 11, 45). The latter in turn transmit the energy over their own 55,000 volt lines across the California-Nevada state boundary to Hawthorne, Nevada, where it is reduced to distribution voltage (R. 2, 8). Each of these transmission lines is approximately 55 miles in length, about one-half being in California and the other half in Nevada (R. 8).

At Hawthorne, in addition to using the energy purchased from the Company for the power and energy requirements of its general activities, the Navy furnishes approximately 25% (R. 28) thereof to the tenants of the Naval personnel quarters ("public quarters"), as well as to tenants of the "Navy Low-Cost Housing Project" (known as Babbitt) which provides living quarters and facilities for civilians connected with the Depot (R. 2, 11, 46). The Navy makes a separate charge to each of the tenants of these living quarters and business concessions for the electric energy furnished them (R. 2, 46). The sales to the tenants were metered deliveries made under written contract at the rate of 1½ cents per Kwhr (R. 32), and the only reason the service was not rendered by the local electric utility (Mineral County) was the latter's financial inability to undertake the business. No. 495, this Term, Tr. of Record, pp. 289, 293.[1] Residence or operation of business concessions at Babbitt is permitted only so long as it is consistent with the Navy's obligations. The lease agreements with the occupants of the "public quarters" and of Babbitt

[1] Under California practice, the record of the joint hearing before the California Commission and the Federal Power Commission (see *infra*, p. 7) was not required to be transmitted to the Supreme Court of California on the petition for review, and the California Public Utilities Commission has declined to forward it to this Court. The record, however, was certified to the Ninth Circuit in the review of the Federal Power Commission's order in *California Electric Power Company* v. *Federal Power Commission*, No. 12987, (see *infra*, p. 8, and is now before this Court in the petition for certiorari in No. 495.

provide that the rental privilege ceases upon termination of employment; for the business concessions, the Navy issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 14–15).

By decision dated July 1, 1948, respondent Public Utilities Commission of the State of California (hereafter termed California Commission) authorized a general rate increase for the Company to be effective August 1, 1948, and in connection therewith prescribed special schedules including so-called P–2 and P–3 Schedules to replace a substantial number of special rate contracts, with which the California Commission was dissatisfied (R. 2, 7, 8–9). On July 30, 1948, the Company sought to terminate its contract with the Navy and to apply, as of October 1, 1948, the P–2 Schedule to its sales to the Navy (R. 2, 9). In addition, the Company failed to renew its contract with Mineral County, which expired by its own terms on October 5, 1948, intending thereby to apply the P–3 Rate to its sales to Mineral County (R. 9). Thereafter, the Company applied to the California Commission for a ruling whether the P–2 and P–3 Schedules were applicable to the sales to the Navy and Mineral County, respectively, since the Navy and Mineral County claimed, among other things, that the California Commission did not have jurisdiction over the rates charged them by the Company (R. 2, 6–7).

A hearing on this application was held by the California Commission on October 7, 1949 (R. 3, 7). That Commission also scheduled further hearings but took them off its calendar when the Federal Power Commission (hereafter termed Federal Commission) indicated, through correspondence, a desire to explore the question of jurisdiction (R. 7).[2] The Federal Commission, on February 15, 1950, issued an order to the Company to show cause why the Company's sales to the Navy and Mineral County were not subject to its jurisdiction under the Federal Power Act, and thereafter, pursuant to mutual agreement between the two commissions, concurrent hearings were held on March 20 and 21, 1950, on the jurisdictional questions involved (R. 3, 7).

On April 13, 1951, the Federal Commission issued its opinion and order, holding that under the Federal Power Act it had exclusive jurisdiction over the Company's sales to the Navy and Mineral County and directing the Company to file the 1943 contract with the Navy and to charge no rate other than those set forth in that filing and in the 1945 contract with Mineral County

[2] For 13 years the Company and its predecessor had without question filed with the Federal Commission its rates for service to Mineral County (R. 26). On October 15, 1948, the Company had submitted for filing with the Federal Commission a new rate applicable to Mineral County, presumably the P-3 rate, representing a 43% increase (R. 27). The Company did not complete the filing by submitting the data required by the Commission's rules to support the proposed increase in rates, and in March 1949 advised the Federal Commission that it had decided not to complete the filing (R. 27).

previously filed, until duly superseded by new rates filed in accordance with the Federal Commission's Rules and Regulations (R. 24–41). Opinion No. 212 in F. P. C. Docket No. E–6269; *Re California Electric Power Company,* 89 PUR (NS) 359. On June 5, 1951, the Federal Commission denied applications for rehearing filed by the Company and the Legal Department of the California Commission, and on June 20, 1951, the Company filed a petition for review of the Federal Commission's order in the Court of Appeals for the Ninth Circuit, as authorized by Section 313 (b) of the Federal Power Act. *California Electric Power Company* v. *Federal Power Commission,* C. A. 9, No. 12987. The California Commission presented its view to the Ninth Circuit as *amicus curiae,* orally and by brief. On October 14, 1952, the Court of Appeals affirmed the order of the Federal Commission, and denied the Company's petition for rehearing on November 12, 1952. A petition for certiorari was filed December 11, 1952, No. 495. The opinion of the Ninth Circuit is reproduced in Appendix B, *infra,* pp. 83–91.

On July 3, 1951, the California Commission issued its order and opinion in which it concluded, on substantially the same record as that before the Federal Commission, that notwithstanding the Federal Commission's prior ruling, it, rather than the Federal Commission, had exclusive jurisdiction over these sales. According to the California Commission, the State's power

to regulate was not barred either by the Commerce Clause or the Federal Power Act, even if it be assumed that the sales were in interstate commerce (R. 11). In reaching this conclusion, the California Commission ruled that Nevada, not having authority over the Navy's purchases or sales of electric energy, was not "directly concerned" with the Company's sales to the Navy within the meaning of Section 20 of Part I of the Federal Power Act (Appendix A, *infra*, pp. 75–76), that the California Commission was the kind of state "commission or other authority" there contemplated, and consequently that it had sole jurisdiction over a sale under that Section (R. 11–12, 13–14).

The California Commission went on to hold that this jurisdiction was not ousted by the Federal Commission's authority under Part II of the Federal Power Act. While admitting that "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), it held sales to the Navy not to be within the jurisdiction conferred upon the Federal Commission by Part II because not sales to a "person" as defined in Section 3 (4) of the Act (R. 14). In addition, it held that "sale for resale," as used in Part II, embraces only sales for resale to companies engaged in the public utility business, and not sales to tenants of the reseller (R. 14–15). Finally, the Commission ruled that, since these sales were regulable by the

State under Section 20 of Part I, federal regulation under Part II was precluded by Section 201 (a) and (b) of the Act, *infra*, pp. 76–77 (R. 15–16).

On the basis of these rulings, the California Commission concluded that the Company's sales to the Navy were subject to its jurisdiction, rather than that of the Federal Commission (R. 19).[3] The California Commission, accordingly, authorized the Company to charge the Navy at the rates set forth in the P–2 Schedule (R. 19).[4]

[3] As to the sales to Mineral County, the California Commission recognized that Nevada was "concerned" with the rates charged to Mineral County (R. 16–17). The California Commission held, however, that Nevada as well as California had provided "a commission or other authority to enforce the requirements of [Section 20 of Part I] within such state," since, according to the California Commission, the Nevada Commission has jurisdiction over the rates charged by Mineral County to its customers (R. 17). In addition, the California Commission ruled that since the Nevada Commission had taken a neutral position at the concurrent hearing, there was no inability to agree under Section 20 (R. 18). From these rulings, the California Commission concluded that it had jurisdiction over the sales to Mineral County under Section 20 of Part I (R. 18).

The California Commission went on to conclude that it, rather than the Federal Commission, also had jurisdiction under Part II, holding (1) that the sales to Mineral County, although for resale, were not to a "person" under Section 3, and (2) that since it had jurisdiction under Section 20, "the proviso clauses of Sections 201 (a) and 201 (b) apply" (R. 18). The California Commission, accordingly, directed the Company to charge the P–3 Rate to Mineral County (R. 19).

[4] The California Commission authorized, rather than directed, the Company to charge these rates to the Navy since its General Order No. 96 authorized utilities to furnish elec-

The California Supreme Court (three judges dissenting) denied the petitions for review filed by the United States and by Mineral County in accordance with Section 67 of the Public Utilities Act of California (now Public Utilities Code, Sections 1756–1760),[5] and affirmed without opinion (R. 68).

SUMMARY OF ARGUMENT

The California Commission's holding, that it, rather than the Federal Commission, has jurisdiction over the Company's sale of energy to the Navy is in square conflict with the Federal Commission's contrary conclusion, affirmed by the

tric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments" (R. 12). The Company, pursuant to this authorization, is seeking to charge the Navy the full P-2 rate thus sanctioned by the California Commission.

[5] In so far as here pertinent, Section 67 provides:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state, for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. * * * No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."

Ninth Circuit, as to this very transaction. We submit that the Ninth Circuit is right and California wrong.

I

Despite the Company's contention, the California Commission properly assumed that the sale was in interstate commerce. The Company's transmission of the energy within California to a point in that state and sale for transmission and ultimate consumption in Nevada presents a classic situation conclusively established to be in interstate commerce. *Powell* v. *U. S. Cartridge Co.*, 337 U. S. 497, 512, reveals the fallacy in the claim that interstate commerce is not involved because the energy is transmitted into Nevada by the Navy for military rather than commercial purposes. In comparison with the *Powell* case, where the Court rejected substantially the same contention and reaffirmed that interstate commerce includes movements across state lines for non-commercial purposes, the instant case is an *a fortiori* one.

Section 201 (f) of the Federal Power Act does not help the Company. That Section was intended to exempt the United States as a wholesale seller from the regulatory burdens of the Act and not, as urged by the Company, to limit the scope of Part II, or to deprive the Government as a purchaser at wholesale of the benefits of regulation of the rates charged to it by its vendor.

II

The three grounds on which the California Commission based its conclusion that the Company's sales to the Navy, which in turn resells a substantial portion thereof to the residents of its housing projects, are not sales at wholesale, *i. e.*, "for resale" within Sections 201 (b) and (d) of the Federal Power Act, are without merit.

A. The mechanical application of the statutory definition of "person" adopted by the California Commission to exclude the United States and Mineral County from "person" as used in the wholesale sale definition of Section 201 (d) seems to have been rejected *sub silentio* by this Court in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515. It has been expressly rejected by three unanimous courts of appeal which reached a result which gives effect to the purpose of the Act, the statutory language read in the light of recognized rules of statutory construction, the legislative history, and the consistent administrative interpretation.

The need of the protection intended to be afforded by the Federal Power Act becomes apparent as far as sales for resale to the Federal Government and local governmental agencies are concerned when it is realized that the number of such sales is substantial. The California Commission's contrary holding imputes to Congress the anomalous intent to deny to the Federal

Government, whose financial interests are directly concerned, the federal protection which it provided for non-governmental purchasers. In addition, it would leave public utilities with complete freedom to indulge in the rankest discrimination against municipal purchasers for resale, a result clearly at odds with the provisions and purposes of the Act. The manifest departure from the congressional purposes which adherence to literal language would thus involve amply justifies following the purpose of the Act, rather than its literal words.

This is especially true since the statutory definitions relied on by California are of the general concepts of "person" and "corporation." It is established that such general definitions are not to be applied mechanically to government, state or federal, particularly in an unusual case such as we have here. Instead, all pertinent indicia of legislative intent must be given weight, with the ultimate criterion being the intention of Congress, not a general definition framed with other purposes in view.

The legislative history reveals that "person" was included in the definition contained in Section 201 (d), not for the purpose of curtailing the Federal Commission's jurisdiction, but to close an obvious loophole in another aspect of an earlier wording and thereby to broaden the Commission's authority. Indeed there is nothing in the legislative history of Section 201 (d) or of

Section 3 evidencing any intention or even awareness that the artificially restricted definitions of Section 3 would carry over to Section 201 (d) so that this important class of wholesale sales would be exempt from federal regulation. This contrasts sharply with the specific Congressional reference to other exemptions when intended.

In all cases in which this question has been raised, the Federal Commission has consistently construed the statute as giving it jurisdiction to regulate sales for resale to governmental bodies, such as the United States and municipalities. This executive interpretation—sustained by three courts of appeals—is an additional aid to construction and entitled to great weight.

B. The California Commission's further ground, that "sale for resale" as used in Section 201 (d) was intended to be limited to such sales when made to companies in the public utility business and consequently not to include such sales where, as here, the resale is to tenants of the reseller, is also without merit. There is nothing in *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83, upon which California relies, to support the suggested distinction, nor has Congress, in considering that case in connection with the enactment of the Federal Power Act, regarded it as being so limited. On the contrary, the Committee Reports, as well as the pertinent comments at the hearings and on the floor of Congress, construe *Attleboro* broadly,

and plainly reveal an intent to confer authority upon the Federal Commission over all wholesale sales regardless of the character of the resale.

C. The California Commission's final ground, which in effect is that because the Company generates power at projects licensed under Part I of the Power Act, its rates are subject to regulation by California under Section 20 of Part I and, accordingly, not by the Federal Commission under Part II, has already been rejected by this Court in the *Penn Water* case, 343 U. S. 414, 424.

In any case, the California Commission does not have jurisdiction under Section 20 of Part I, which permits joint regulation of interstate sales of hydroelectric energy by the states directly concerned when each has a regulatory body qualified under that section and they are able to agree. Contrary to the ruling of the California Commission, the doctrine of intergovernmental immunity no more precludes Nevada from regulating the Company's sale to the Navy, than it does California. And apart from intergovernmental immunity, it is clear that the sale to the Navy for consumers in Nevada is of concern to Nevada as well as to California. Hence, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised by California acting alone. A mere reading of the pertinent statutes, moreover, shows that Nevada has failed

to provide "a commission or other authority to enforce the [Section's] requirements * * * within such State." This renders it impossible for a properly constituted authority of Nevada to agree with the California Commission concerning the rates to be charged to the Navy. Furthermore, Nevada has not agreed. Thus Section 20 itself operates to place jurisdiction over the sales in the Federal Commission.

D. The additional contentions of the Company, not reached by the California Commission, are also insubstantial.

1. The argument that Part II applies only when the rate at which the energy is resold at retail is subject to state regulation finds no support in statutory language and is inconsistent with the Federal Commission's consistent interpretation of the rate regulatory provisions; it ignores the legislative history, and overlooks the significant fact that here, since the Navy is the purchaser which is reselling, the burden of excessive rates falls inevitably upon the ultimate consumers or the nation's taxpayers.

2. The fact that the resales are not specifically provided for in the contract is immaterial since it is undisputed that the Company knew of the resales. The Act does not make the Federal Commission's jurisdiction dependent upon the terms of a contract. Since the contract can be phrased to suit the whims and objectives of either party, the Company's argument, if accepted, would open

the way to easy circumvention of federal regulation.

3. Similarly, the Federal Commission is not ousted of jurisdiction because the Navy resells only 25% of the energy purchased. The Company's contention seeks to raise again old objections as to the Federal Commission's jurisdiction over commingled energy, which have been consistently rejected by the Commission and the courts, most recently by this Court in the *Penn Water* case, 343 U. S. 414.

4. Finally, these sales are not within the exception contained in Section 201 (b) for "facilities used in local distribution." On the facts, the facilities from which the sales are made are not "used in local distribution," as this phrase was interpreted in *Federal Power Commission* v. *East Ohio Gas Co.*; 338 U. S. 464. In addition, the Act does not make the Federal Commission's jurisdiction over sales for resale dependent upon the nature of the facilities involved in effecting the sales.

ARGUMENT

In this case, the California Commission assumed that the Company's sales of electric energy to the Navy were in interstate commerce but nevertheless held that, as it construed the Federal Power Act, jurisdiction over these sales was left or vested in it rather than the Federal Power Commission. The latter, on the other hand, in *Cali-*

fornia Electric Power Company, 89 PUR(NS) 359, affirmed *sub nom. California Electric Power Company* v. *Federal Power Commission*, C. A. 9, No. 12987 (decided October 14, 1952), App. B, petition for certiorari pending, No. 495, *infra*, pp. 83–91, has read the Federal Power Act as conferring jurisdiction on it over the same sales by the Company. Inasmuch as it is common ground among the parties that only one regulatory body can have jurisdiction over these sales, the ultimate question presented is which of the two agencies, state and federal, has jurisdiction.

We believe—and we will demonstrate below—that the California Commission misread the Power Act and that, properly construed, that Act vests jurisdiction over these sales in the federal, rather than the state, regulatory body. The California Commission properly assumed, however, that these sales are in interstate commerce. The Company has questioned whether the sales are in interstate commerce (Br. in Opp., pp. 4–7), and since it is basic to the applicability of the Power Act that the transaction be in interstate commerce, we first discuss the interstate commerce question and show in Point I that the Company's claims in regard thereto are without merit. We then demonstrate in Point II that these sales are sales at wholesale, within the Federal Commission's jurisdiction under Part II of the Power Act. We shall also show that these sales, made by a company licensed under Part I, are subject to

federal, rather than state, regulation under Section 20 of that Part.[6]

I

THE COMPANY'S SALES TO THE NAVY ARE IN INTERSTATE COMMERCE

There can be no doubt that the sale here involved is in interstate commerce. Here the Company first transmits the energy within the State of California to its Mill Creek Station in that state, and there it sells and delivers the energy for transmission across the California-Nevada state line for ultimate consumption in the State of Nevada. These facts bring the instant case squarely within the decisions of this Court which establish conclusively that sales for immediate interstate shipment are a part of interstate commerce. *Currin* v. *Wallace*, 306 U. S. 1, 10, and

[6] The California Commission's further holding that state regulation of this sale would not be a burden on interstate commerce, and hence is not barred by the Commerce Clause, is not discussed. While such a ruling would be pertinent if Congress had not undertaken to provide regulation (cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 29-31); it has no relevance where Congress, by the Federal Power Act, has created a comprehensive and effective scheme of dual regulation (cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329) and vested jurisdiction over sales of this type in the Federal Commission (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, at 524).

cases cited; *Mulford* v. *Smith*, 307 U. S. 38, 47–48; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381. In the *Currin* case this Court stated (306 U. S. at 10):

> * * * So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 54; *Stafford* v. *Wallace*, 258 U. S. 495, 519; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

The Daniel Ball, 10 Wallace 557, establishes that a person who transports a product on a portion of an interstate, through journey, even though his portion of the transportation occurs entirely within a single state, is engaged in interstate commerce. See also, *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228–229. The same is obviously true as to a sale for interstate shipment, even though the seller never crosses the state line. This Court has so held with respect to the Federal Power

Act itself. *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 70–71. See also *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 688; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508; *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. 2d 153 (C. A. D. C.), which hold that in the closely related Natural Gas Act Congress intended "interstate commerce" to have the same meaning as "that which theretofore had been given to it in the opinions of this Court." 331 U. S. at 688.

The Company claims that the fact that the transmission of energy across the state boundary is by the Navy removes the transaction from the ambit of interstate commerce. The argument is that Navy transmission is for military rather than commercial purposes. This is substantially the same contention which the Court recently rejected in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 512, where it was unsuccessfully argued that the interstate shipment of munitions by the Army did not constitute interstate commerce. That case reaffirmed the oft accepted principle that interstate commerce includes movements across state lines for noncommercial purposes.[7] In compari-

[7] See *United States* v. *Hill*, 248 U. S. 420, 423–424 (transportation of whiskey for personal consumption); *Edwards* v. *California*, 314 U. S. 160, 172 (exclusion of paupers); *Thornton* v. *United States*, 271 U. S. 414, 425 (unrestrained ranging of cattle); *Caminetti* v. *United States*, 242 U. S. 470 (transportation of a woman for an immoral purpose but not for

son with the *Powell* decision, the Navy's transmission across the state line here is *a fortiori* in interstate commerce, since here the transmission was not of the munitions themselves, as was the situation in *Powell*, but rather of electric energy which was to be used not only in the production of munitions but also at the residence of employees engaged in such production.

The Company also argues that "so far as generation and transmission by Company are concerned, [the energy is] strictly California intrastate energy" (Br. in Opp., p. 4), but this overlooks the fact that the Federal Power Act regulates the "*sale* of electric energy at wholesale in interstate commerce" (Section 201 (b)) and that the Company is the seller in such an interstate sale. See cases cited *supra*, pp. 20–22. As the Ninth Circuit declared in dealing with this very issue (Appendix B, *infra*, p. 87):

> The transactions in question manifestly constitute sales by a public utility of electric energy in interstate commerce. It is of no moment that petitioner's facilities for the transmission and sale of the energy are all located in California and that those used to transmit it across the line into Nevada

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commercial vice); *Gooch* v. *United States*, 297 U. S. 124 (transportation of a kidnapped person); *Brooks* v. *United States*, 267 U. S. 432 (transportation of a stolen automobile); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 549.

> are owned by the purchasers of the energy. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Federal Power Commission* v. *Arizona Edison Co.*, 9 Cir., 194 F 2d 679. Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. *Federal Power Commission* v. *Arizona Edison Co., supra,* p. 681. The question is not whether the United States is in interstate commerce, but whether petitioner is.

Nor is there any merit to the Company's contention (Br. in Opp., p. 6) that the sale is not in interstate commerce under the Power Act because of the provisions of Section 201 (f) of the Act, which provides insofar as here pertinent:

> No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of [the foregoing] * * *.

This provision exempts the United States and the states and their subdivisions from the regulatory burdens of the Act; it was not intended to limit the scope of the definitions contained in Part II or, for that matter, to deprive the United States of the rate benefits which might accrue from the regulation of the rates at which a public utility sells to it. In short, the exemption means, insofar as

here pertinent, only that the United States is not to be deemed a "public utility," subject to regulation by the Federal Commission under the Act. This provision was included so as to "remove all doubt that the act is not to apply to public projects, Federal, State or municipal," S. Rep. No. 621, 74th Cong., 1st Sess., pp. 19, 49; Hearings before Senate Interstate Commerce Committee on S. 1725, 74th Cong., 1st Sess., pp. 256–257.[8] Here, however, as we have already pointed out, *supra*, pp. 23–24, the Government is not engaging in the wholesale sale of the energy here involved, but rather is the purchaser, with the Company being the wholesale vendor. Neither the United States nor Mineral County are being sub-

[8] At the Senate hearings on the bill which subsequently become Part II, Mr. DeVane, then Solicitor of the Federal Commission and one of the draftsmen of the bill, testified (Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 256–257):

"Mr. DEVANE. We did not feel that it was within our province to prepare a bill that would undertake to regulate municipal, State, or Government utilities.

* * * * * *

"Insofar as all governmental projects are concerned, our approach to the matter was that in the legislation creating those authorities and giving those authorities their powers, this Congress had provided the power that it wanted those agencies to have, and it did not seem to us that it was proper to attempt to bring those other governmental agencies under the regulation of the Federal Power Commission; so that in our preparation of this bill we have left them out, and they are outside the pale of this bill.

"Senator BARKLEY. On the theory that it is not necessary for the Government to regulate itself?

"Mr. DEVANE. That is right."

jected to any "provision of this Part"; only the seller, which is not a governmental body, is being regulated. Consequently, since "it is clear that the intended exclusion or exemption is from the regulatory burdens of the statute" and "[t]he entire thrust of Part II is toward the seller at wholesale, not the buyer" (*California Electric Power Co.* v. *Federal Power Commission*, Appendix B, *infra*, p. 89), Section 201 (f) does not operate to remove these sales from federal regulation of the Act.

Section 201 (f) actually seems to buttress the contrary conclusion. For in that provision, Congress recognized that the United States could engage in the interstate activities which the terms of the Act subjected to regulation by the Federal Commission, and regarded the express exemption contained in Section 201 (f) as needed to show that the United States was not to be subject to regulation as a "public utility" under Part II of the Act. See S. Rep. No. 621, 74th Cong., 1st Sess., pp. 19, 49.

II

THE COMPANY'S SALES TO THE NAVY ARE SALES AT WHOLESALE SUBJECT TO REGULATION BY THE FEDERAL COMMISSION UNDER PART II OF THE POWER ACT AND NOT BY THE CALIFORNIA COMMISSION

Sections 205 and 206 of the Power Act provide for Federal regulation of the rates charged by any "public utility" for "the * * * sale of

electric energy subject to the jurisdiction of the Commission." Appendix A, *infra*, pp. 78–80. Section 201 (b) subjects to the Federal Commission's jurisdiction "* * * the sale of electric energy at wholesale in interstate commerce." Appendix A, *infra*, pp. 76–77. Section 201 (d) defines "sale * * * at wholesale" as "a sale * * * to any person for resale." Appendix A, *infra*, p. 77.

In the instant case, it is undisputed that the Company is a "public utility." Cf. *City of Los Angeles* v. *The Nevada-California Electric Corporation*,[3] 2 F. P. C. 104, 32 PUR(NS) 193. In addition, as we have just shown, the Company's sales to the Navy are in interstate commerce. And clearly the sales to the Navy are "at wholesale," *i. e.*, "for resale," within the ordinary meaning of those words.

But while conceding that "the Navy is in a sense 'reselling' energy purchased" from the Company (R. 15), the California Commission nevertheless concluded that the sales are not "at wholesale" within the meaning of Section 201. First, the California Commission held that the sale was not to a "person," within the meaning of Section 201 (d), because the definition of "person" contained in Section 3 did not specifically include the United States (R. 14). Secondly, it ruled that Congress intended to include in "sales for resale" only such sales to companies

[3] The name of the Company was changed from The Nevada-California Electric Corporation to its present name by amendment of its certificate of incorporation in 1941.

engaged in the public utility business and not sales where, as here, the resales are to the tenants of the reseller (R. 14–15). Finally, the California Commission was of the opinion that it had jurisdiction over the Company's sales by virtue of Section 20 of Part I; and consequently that "the provisos of Sections 201 (a) and 201 (b) in Part II operate to deny Federal Commission jurisdiction under Part II" (R. 15–16). Each of these grounds is without merit, as the Federal Commission had previously (R. 29–34) and the Ninth Circuit has subsequently held.

A. INTERSTATE WHOLESALE SALES TO THE UNITED STATES (OR TO MUNICIPALITIES) ARE NOT REMOVED FROM THE JURISDICTION OF THE FEDERAL COMMISSION BY REASON OF THE STATUTORY DEFINITIONS OF "PERSON" AND "CORPORATION".

The argument that sales at wholesale to the United States or a municipality do not constitute sales at wholesale within the meaning of the Federal Power Act rests upon the statutory definition of the words "person" and "corporation."

Section 201 (d) defines the sale of electric energy at wholesale to mean a sale "to any person for resale." Appendix A, *infra*, p. 77. Section 3 (4) contains the common definition of "person" as meaning "an individual or a corporation." Section 3 (3) defines corporation to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing." Appendix A, *infra*, p. 74. It shall not

shall not include 'municipalities' as hereinafter defined." Appendix A, infra, p. 74.

Following these definitions literally, respondent argues, and the California Commission held, that neither the Navy nor Mineral County are "persons" within the meaning of the definition, and that therefore sales for resale to them are not sales at wholesale within the meaning of the Act.

Acceptance of this argument would mean that public utilities' sales of electric energy at wholesale to private utilities would be subject to federal regulation but not their sales for resale to municipalities operating their own distributing systems or to the Federal Government. The identical argument was presented to this Court in *Connecticut Light and Power Company* v. *Federal Power Commission*, 324 U. S. 515, where it seems to have been rejected *sub silentio*.[10] And

[10] One phase of the *Connecticut Light and Power* case involved sales "at wholesale to the Borough of Groton, which operated a municipal distribution plant," 324 U. S. at 520-521, and which resold a small portion of the energy received from the Power Company to a utility serving a nearby island in New York. In its brief the company advanced the same contention as to interstate sales to a municipality for resale not being subject to the Federal Commission's jurisdiction as was accepted by the California Commission and court in this case. See No. 189, October Term, 1944, Brief for Petitioner, pp. 54–57. The Federal Commission's brief also dealt with the point rather fully (pp. 48–53). Furthermore, the company argued that the volume of energy transmitted out of state after resale by the Borough of Groton was too insignificant to warrant the exercise of federal authority

it has also been rejected by three unanimous courts of appeals, the Ninth Circuit in the companion case to this one coming from the Federal Power Commission (see p. 8, *supra*), the Seventh Circuit in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, and the District of Columbia Circuit in *Wisconsin et al.* v. *Federal Power Commission*, and *Wisconsin Power and Light Co.* v. *Federal Power Commission*, Nos. 11224, 11225 (decided November 13, 1952). The decisions of the Seventh and Ninth Circuits are presently pending before this Court on petitions for certiorari, Nos. 291, 294, and 495. The decisions of the Ninth and District of Columbia Circuits which have not yet been reported, are set forth in Appendices B and C to this brief.[11]

(324 U. S. at 535–536). The Court's opinion reversing the Commission on other aspects of the case prescribed standards for it to follow. The Court specifically rejected the company's contention that the Commission's jurisdiction was "conditioned * * * upon any particular volume or proportion of interstate energy involved." (324 U. S. at 536), but did not see fit to mention the company's contention with respect to the point here under consideration. But in order to reach the question as to the significance of the small proportion of interstate energy, the Court was required to assume that the Federal Commission would have had jurisdiction over such interstate transactions. The Government's brief presented two alternative grounds in support of the Commission's jurisdiction, one of which was the identical argument advanced herein. Since the matter was treated *sub silentio*, there is no way of knowing to what extent, if at all, the Court relied on either ground.

[11] It is to be noted that the contrary decision of the Supreme Court of California in this case was reached by a 4–3 vote.

These decisions have properly interpreted the Federal Power Act, giving effect to its purpose, its language read in the light of familiar principles of statutory construction, and its legislative history.

1. The purpose of the Federal Power Act, as this Court has frequently noted (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 514–521; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 335–336), was to protect consumers against excessive electric rates resulting from the decisions denying to the states authority to regulate interstate wholesale transactions. This principle, as to the lack of state authority over interstate wholesale rates, extended to such sales when made to municipalities or to the United States for resale to consumers as much as when made to private utility companies. Certainly Congress would have had no reason for believing that the state from which power was transmitted across state lines possessed greater authority over the interstate rates when the wholesale customer was the Federal Government or a local governmental agency in another state. The number of sales for resale to such governmental bodies is substantial.[12]

[12] Out of the total number of 1,070 rate schedules on file with the Federal Power Commission on November 15, 1952, 213 were for sales by a private company to state agencies or municipalities and 23 for sales to federal agencies.

In so far as the United States is concerned, the effect of the California Commission's construction is to impute to Congress an intent to deny to the Federal Government—of which Congress is a part and whose financial interests are its direct concern—the federal protection which it has provided for non-governmental purchasers whose financial interests are of less immediate concern to it. In addition, this construction presumes a willingness by Congress to remit the financial interests of the Federal Government, but not those of the public generally, to the protection afforded by state regulation, however inadequate it might be—a result which would be anomalous even if the states had the authority to regulate the rate involved, as they did not have here. See also, *infra,* pp. 63–64.

The incongruity of the California Commission's conclusion is even more striking when applied to sales for resale to municipalities. In the words of the Seventh Circuit, with the subsequent concurrence of the Ninth and District of Columbia Circuits (197 F. 2d at 479): "To exempt municipal corporations would mean, as the Commission states in *Otter-Tail P. Co.,* 2 F. P. C. 134, 137, 33 PUR NS 257, 260, that 'a utility may not discriminate in rates charged private persons or corporations, but is at complete and unfettered liberty to indulge in the rankest discrimination as between municipalities, or as between private cus-

tomers and municipalities, receiving the same service.' We can not conceive that Congress intended to deprive consumers served by municipally owned distribution systems of the protection it was providing customers of other corporations against unjust and unreasonable rates. To construe the Act otherwise would fail to give effect to other provisions, such as Section 306, allowing municipalities to file complaints before the Commission on account 'of anything done or omitted to be done' in contravention of the Act and Section 313 (a), which authorized review of Commission orders at the behest of any aggrieved municipalities. We agree with the Commission's comment in *Otter Tail P. Co.* v. *F. P. C. supra,* at 138: 'Since the most serious, if not the only real complaint a municipality could have against a public utility would involve the rates charged it for electric energy at wholesale (the Commission has no power to regulate the retail rates of a public utility), it is most persuasive Congress intended that we have jurisdiction over such wholesale rates'."

In view of the manifest departure from the Congressional purpose if interstate rates in sales to the federal or local governments were not subjected to federal regulation, it would be appropriate here not "to wince at carrying out [the Act's] purpose because the words used do not formally quite match with it" (*Federal Deposit*

Insurance Corp. v. *Tremaine*, 133 F. 2d 827, 830 (C. A. 2)), even if it be assumed that literally the United States were excluded from "person" as defined in Section 3. For adherence to literal language would create incongruities and produce results "plainly at variance with the policy of the legislation as a whole" (*Ozawa* v. *United States*, 260 U. S. 178, 194), a result which, this Court frequently has held, justified following "that purpose, rather than the literal words" (*United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543). See also, *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 201, 206; *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 106; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 55; *United States* v. *Dickerson*, 310 U. S. 554, 562; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *Johansen* v. *United States*, 343 U. S. 427, 431; *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C. A. 2), affirmed, 326 U. S. 404, 409; *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1).

2. It is of significance that all of the definitions with which we are dealing here are definitions of such general concepts as "person" and "corporation" which, we show below, appeared in the statute because of considerations having no relation at all to the present problem. The courts have recognized both in respect to the application of such general terms to government—state

or federal—and to the application of definitions to situations plainly not foreseen, that decision cannot rest on a mechanical application of definitions irrespective of all other considerations.

In *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 201, the Court found it necessary to depart from a literal reading of a definition much more specialized in content than that involved here. As the Court there stated, "Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8 (f) (1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision." The Court's conclusion "that Congress would not have intended such a result" is much more appropriate here, where the problem is one as to which the intention of Congress is even more plain.

With respect to the application to government of general statutory provisions, it has been frequently recognized that all pertinent indicia of legislative intent must be given weight. Statutory provisions affecting "persons" have frequently been held not to include the United States where the consequences of a contrary reading would be to impose restrictions upon the Government, and Congress would not have so intended. See, *e. g.*, *United States* v. *Wittek*, 337 U. S. 346, 358–360; *United States* v. *United Mine Workers*,

330 U. S. 258, 272–276. In the *Wittek* case, this conclusion was reached even though literally the United States would have fallen within the statutory definition. See 337 U. S. at 359. On the other hand, "person" has been read to include the United States, where the result is to give it benefits being made available generally to private parties—also because that is what Congress would have intended. *Far Eastern Conference* v. *United States*, 342 U. S. 570, 576; *Stanley* v. *Schwalby*, 147 U. S. 508, 515; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *Ohio* v. *Helvering*, 292 U. S. 360, 370, and cases cited; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 91–93; *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.).

In most of the cases cited there was no definition of "person" which would be controlling if read literally. But in *Ohio* v. *Helvering*, 292 U. S. 360, there was a definition of "person" which, read literally, would not have included the State of Ohio.[13] In holding that the tax applied to Ohio, the Court nevertheless applied the

[13] The taxes on liquor dealers were imposed on "every person" selling liquor (292 U. S. at 367). "Person" was defined by 26 U. S. C. (1926 ed.) 11 as follows:

"* * * where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

The Court did not refer to or rest its decision upon the introductory clause.

same principle as where "person" had not been defined (292 U. S. at 370): "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, it is said that the word 'person' in the statute there under consideration would include the United States as a body politic and corporate."

Insofar as the United States is concerned, the statutory situation in the instant case is the same as in *Ohio* v. *Helvering*. There is the general reference to "person" in the phrase "sale of electric energy to any person for resale" in § 201 (d). The definition of "person" in § 3 (4) as an "individual or a corporation" and of "corporation" in § 3 (3) would not seem literally to include the United States, but does not specifically exclude it. This was equally true in the definition in *Ohio* v. *Helvering* insofar as its application to states was concerned. Just as in the *Wittek* case, where the definition literally would have included the Government as a "landlord" but the Court found the Government not to be subject to the statute, the ultimate criteria was the intention of Congress, not a general definition framed with other purposes in view.

It is thus fair to say that whether or not there is a general definition of "person" or "corporation," "there is no hard and fast rule of exclusion" (*United States* v. *Cooper Corp.*, 312 U. S.

600, 604–605); "[w]hether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment" (*Georgia* v. *Evans*, 316 U. S. 159, 161), i. e., "the connection in which the word is found" (*Ohio* v. *Helvering, supra*, at 370). "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." *United States* v. *Cooper Corp.*, 312 U. S. at p. 605.

The verbal problem is more difficult as to sales to municipalities, since § 3 (3) specifically declares that the word "corporation" "shall not include 'municipalities' * * *." This provision was taken over without change from the definition of corporation in the 1920 Federal Water Power Act (41 Stat. 1064, § 3, paragraph 3). In 1920, of course, there was no Part II of the Federal Power Act, so that the sentence clearly was not meant to deprive municipalities of the benefits of the rate regulation provided for in the 1935 statute. The argument that the provision should not be construed as leaving interstate wholesale rates to municipalities without the protection of federal law rests on the other consi' rations discussed in this portion of this brief.

An additional caveat is necessary. We do not suggest that either the United States or munici-

palities are "persons" or "corporations" for all purposes under the Federal Power Act. Certainly the United States is not subject to affirmative regulatory control, and the same is true as to municipalities except where the statute is specific. See § 201 (f) and cf. §§ 4 (e) and 10 (e). Neither state nor federal governments were to be regarded as "persons" for purposes of requiring private utilities to make interconnections with them under § 202 (b). (*Federal Power Commission* v. *Idaho Power Co.*, No. 12, decided November 10, 1952.) Statements in Committee hearings indicate that the definitions of "persons" and "corporations," as well as § 201 (f), were thought to be means of achieving this end. See Senate Hearings on S. 1725, 74th Cong., 1st Sess., pp. 256–257; House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 395–398. On the other hand, for purposes of the regulation of the rates charged where private utilities voluntarily undertake to render service to the federal or local governments as wholsale purchasers for resale (as in this case) and for purposes of judicial review (*Far Eastern Conference* v. *United States*, 342 U. S. 570, 576), we think it clear that the United States is to be regarded as a "person."

The conclusion to be drawn from this analysis is that insofar as the application of various provisions of the Act to federal and state governments is concerned, a mechanical reading of the definitions should not be the sole criterion, and that it

is appropriate here, as in other cases dealing with similar problems, to consider all other guides to Congressional intention.

3. The legislative history of § 201 (d) shows that the word "person" in the phrase "sale of electric energy to any person for resale" was not introduced into the definition of "wholesale sale" contained in Section 201 for the purpose of limiting the Commission's jurisdiction over wholesale sales, but merely as an incident to a rephrasing of the definition of "wholesale sale" to close an obvious loophole in another aspect of the earlier wording. The definition of "wholesale sale" in the bill (S. 2796, 74th Cong., 1st Sess.) as it passed the Senate and came to the House, did not contain the word "person" nor did it exempt sales for resale to the United States, to municipalities, or anyone else because of the purchaser's identity.[14] As a result of an amendment added without comment on the floor of the Senate (79 Cong. Rec. 8858), "wholesale sale" was defined to extend only to those situations where the energy was "sold for resale after

[14] S. 1725, 74th Cong., 1st Sess., as introduced in the Senate, and S. 2796, the substitute bill reported by the Senate Committee on Interstate Commerce, proposed that the Federal Commission have jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Although at this stage there was no definition of "wholesale sale," the bills in effect defined the phrase by excluding "retail sale of such energy in local distribution."

its transmission in interstate commerce or before such transmission if the same is thereafter so transmitted." This omission of sales made *in the course of* transmission resulted in the proposed legislation's being inapplicable to the very type of sale involved in *Public Utilities Commission v. Attleboro Co.*, 273 U. S. 83. The House Committee corrected this defect by adopting the present broad definition of "wholesale sale" and in so doing, used the word "person" for the first time. The broad phrase sale "to any person for resale" was clearly not intended as a restrictive one. On the contrary, it seems plain that the intent was that "any person" means all purchasers at wholesale, the normal meaning of the sweeping phrase in the absence of a restrictive statutory definition. Significantly the Committee neither used the word "person" in describing the content of its proposal nor referred to the definitions contained in § 3. Indeed, the Committee stated without qualification that "a 'wholesale' transaction is defined to mean the sale of electric energy for resale * * *" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8). Far from indicating a restrictive view of the Federal Commission's jurisdiction, this makes clear that the Committee intended that the Federal Commission should regulate all interstate sales for resale regardless of who the purchaser for resale may

be.[15] Since there was no subsequent discussion of the change suggested by the Committee, which was accepted by the Conference Committee without comment, H. Rep. No. 1903, 74th Cong., 1st Sess., the Committee's remarks are the only clue to what Congress meant.

In addition, the report nowhere manifested a purpose to exempt any sales for resale, let alone such sales to the United States or municipalities. This is particularly significant, for the report plainly indicated when an exemption was intended. Thus, immediately following the first restatement of the definition of wholesale sales, the report added "and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce." H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8. Had the Committee intended also to exempt sales for resale to governmental bodies, it would have pointed that out. These considerations, plus the further one that the House definition was intended generally to broaden the Senate definition which it superseded, strongly suggest that "person" in Section 201 (d) was not used in the artificially restricted meaning of Section 3.

[15] While the Committee elsewhere described a wholesale sale as a "sale to any person for resale" (*id.*, at p. 27), there again "person" was not emphasized, nor was there any indication, such as quotation marks, that "person" was used in the limited meaning of Section 3, rather than in an all-inclusive sense.

The history of Section 3, which contains the restrictive definitions of "person" and "corporation," likewise indicates that there was no Congressional purpose thereby to exempt sales for resale to the United States and other governmental bodies. The definition of "person" was added by the original draft of the 1935 amendments along with definitions of certain other terms. It, therefore, could not have been intended originally to affect the meaning of "wholesale sale" for, as we have shown, *supra*, pp. 40–42, it was not until later that the word "person" was introduced into the definition of that phrase. Moreover, it is noteworthy that the House Committee's comments on Section 3, which were made after "person" was added to the definition of sale at wholesale, not only does not refer to any additional impact of the definition of "person" (see *supra*, pp. 41–42), but in effect adopts the very general comments of the Senate Committee made prior to the inclusion of "person" in the wholesale sale definition. Compare H. Rep. No. 1318, 74th Cong, 1st Sess., p. 22, with S. Rep. No. 621, 74th Cong., 1st Sess, p. 42.[16]

[16] The Senate Report states merely:
"The terms 'person', 'licensee', 'Commission', 'Commissioner', 'State commissions', and 'security' are defined for the first time. Their usefulness in the drafting of later provisions is obvious."

The House Report notes that Section 3 "adds new definitions of 'person', 'licensee', 'commission', 'commissioner', 'State commission' and 'security', all of which are of assistance in drafting the rest of the title."

When, accordingly, there is borne "in mind the gradual development of the various provisions of the Act" (*Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, 479 (C. A. 7)), it seems only proper to conclude that when the definition of "sale at wholesale" in Section 201 (d) was rewritten in the House, the word "person" was used therein without intention by the draftsmen that the artificially restricted meaning given to the word in Section 3 be carried over to Section 201 (d).

Finally, the Federal Commission, the agency primarily charged with the administration of the Power Act, has consistently read Section 201 (d) not to exclude sales for resale to governmental bodies, such as the United States and municipalities. This "executive interpretation" is an additional aid to construction, indicating that the United States was not excluded from "person" as used in Section 201 (d). Cf. *United States* v. *Cooper Corp.*, quoted *supra*, p. 38. In all cases in which this question has been raised, the Federal Commission has construed Section 201 (d) not to exempt from its jurisdiction any sales for resale in interstate commerce. *Otter-Tail Power Company*, 2 F. P. C. 134, 136–140, 33 PUR(NS) 257, 259–269; *Connecticut Light & Power Company*, 3 F. P. C. 132, 144, 44 PUR(NS) 170, 181, affirmed, 141 F. 2d 14 (C. A. D. C.), reversed on other grounds, 324 U. S. 515; *Otter-Tail*

Power Company, 8 F. P. C. 393; *Wisconsin Power & Light Company*, F. P. C. Opinion No. 215, issued July 12, 1951, affirmed *sub nom. Wisconsin Power & Light Co.* v. *Federal Power Commission*, C. A. D. C. Nos. 11224, 11225 (decided November 13, 1952, Appendix C, *infra*, p. 92); see, also, *City of Los Angeles* v. *The Nevada-California Electric Corp.*, 2 F. P. C. 104, 32 PUR (NS) 193. This consistent interpretation by the responisble administrative agency is, under well-established principles, entitled to great weight. See *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549.[17]

Our view on this point may be summarized in the language of the Seventh Circuit in the *Wisconsin-Michigan* case, 197 F. 2d at 479:

> After consideration of the legislative history of the respective provisions of the Act, we think the apparent inconsistency was an oversight and that Congress never intended to exclude from its definition of sales for resale, sales to municipalities for resale. When we bear in mind the gradual development of the various provisions of

[17] The Company's suggestion that the California Commission's ruling is supported by Section 201 (f) (Br. in Opp., p. 13) overlooks the distinction already pointed out (*supra*, pp. 24–26), that in so far as here pertinent, Section 201 (f) was intended to relieve the United States from regulation as a public utility when it engaged in sales for resale, but not to relieve from federal regulation the public utility making such sales for resale to the United States.

> the Act and the policy of the statute as a whole, we think that the "slip" was inadvertent and that we must so interpret the Act as to make effective its over-all purpose, despite the literal words of Part I. *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345; *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 62 S. Ct. 445, 86 L. Ed. 671. In doing so we look also to the continued construction of the Act by the Commission,—the agency charged with its administration. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; *United States* v. *American Trucking Assn.,* supra. The report of the Congressional Committee recommended no exemption of wholesales to municipalities, yet where an exemption was intended, the report so stated, House Rep. No. 1318, 74th Cong., 1st Sess., p. 8. The House definition of wholesaler was obviously intended to broaden the Senate definition which it supplanted. All this reflects, we think, an intent not so to limit the word "person" as to exclude any one selling electric energy for resale.

This reasoning was accepted by both the Ninth and District of Columbia Circuits without elaboration, the former stating succinctly (Appendix B, *infra,* p. 88):

> that reference back to the early definitions contained in Part I should not be permitted to thwart the general policy manifested by the statute as a whole. It seems

more than probable that the significance of those definitions was overlooked in the later formulation of Part II.

B. THE FEDERAL POWER COMMISSION HAS JURISDICTION TO REGULATE INTERSTATE WHOLESALE SALES REGARDLESS OF THE NATURE OF THE RESELLER

There is no substance to the California Commission's further conclusion that "sale for resale" as used in Section 201 (d) was intended to be limited to such sales when made to companies in the public utility business and consequently not to include such sales where, as here, the resale is to the tenants of the reseller.

Calfornia's argument recognizes that "[t]he courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision" [*Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83] (R. 15). But the California Commission asserts that since the *Attleboro* case—and others—involves sales to privately owned utilities for resale and not to governmental units, the federal statute cannot apply to the latter, even though the California Commission does not deny that the Navy is "in a sense 'reselling' energy purchased from" the Power Company (R. 15). The assumption upon which the argument rests is that because the cases denying the States power to regulated wholesale interstate rates had involved sales to private utilities companies, the area in which the States could not act was similarly limited—and that therefore

the Federal Power Act only reaches interstate wholesale rates to such utilities.

Nothing in the *Attleboro* case supports the suggested distinction. The opinion differentiates between wholesale interstate rates which it regarded as "essentially national in character" and retail rates which it thought to be local, and therefore subject to state regulation (273 U. S. at 87–90). This, of course, would be true to the same extent whether the purchaser was a private company or a governmental agency. Certainly the fact that the purchaser was the United States Navy would not make the transaction less "national in character." Furthermore, nothing in the *Attleboro* opinion gives the slightest weight to the fact that the purchaser was a private corporation rather than a public body.

The *Attleboro* case has never been described by Congress, when it enacted the Federal Power Act, or by this Court, as limiting the denial of State power to sales to private companies. In *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 67–8, the gap which *Attleboro* created and the Federal Power Act filled was broadly described in language inclusive of all interstate sales as follows:

> The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act, *supra* note 1, was to give a federal agency power to regulate the sale of electric energy across state lines. Regu-

> lation of such sales had been denied to the states by *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83. * * *

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 515, the Court summarized the prior law in this way:

> * * * sales for resale, *usually* to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority. [Italics supplied.]

Nothing in the language or history of the 1935 Act even remotely implies that Congress viewed the *Attleboro* gap as narrowly as California's argument would require. The language of the statute contains no special restrictive provision. (We have already shown (*supra*, pp. 28–47) that the definitions in Sections 201 (d) and 3 (3) and (4) were not meant to embody any such limitation.) The statutory language is "sale of electric energy to any person for resale." The Committee Reports contain broad statements indicating that Congress was not aware of any limitation upon the States' inability to regulate interstate wholesale rates. The House Report declares in sweeping terms (H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8):

> * * * Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A "wholesale" transaction is defined to mean the sale of electric energy for resale, and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

See also S. Rep. 621, 74th Cong., 1st Sess., p. 48. The explanations of the proponents and draftsmen of the bill before the Committees and on the floor of Congress likewise reveal the same intent. See Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 421, 422, 497–498, 523; Hearings, Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess., p. 760; 79 Cong. Rec. 10377. See also Hearings on H. R. 5423, *id.*, pp. 384, 402, 435, 522; Hearings on S. 1725 *id.*, pp. 250, 800–803. Congress thus plainly intended to adopt the wholesale-retail distinction delineated in the *Attleboro* case,[18] and to confer authority over all wholesale sales, regardless of the identity of the reseller, upon the Federal Commission.

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[18] See, also, *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23.

All of these general statements show that the *Attleboro* doctrine was thought applicable to all interstate wholesale transactions—without any intimation in favor of the limitation for which California contends based upon the identity of the purchaser for resale.

C. THE CALIFORNIA COMMISSION DOES NOT GAIN NOR THE FEDERAL POWER COMMISSION LOSE JURISDICTION BECAUSE THE CALIFORNIA COMPANY IS LICENSED TO OPERATE HYDROELECTRIC POWER PROJECTS UNDER PART I OF THE FEDERAL POWER ACT. ON THE CONTRARY, SINCE THE REQUISITES FOR STATE ACTION UNDER SECTION 20 OF PART I HAVE NOT BEEN MET, SECTION 20 IS AN INDEPENDENT BASIS FOR THE EXERCISE OF AUTHORITY BY THE FEDERAL POWER COMMISSION

Respondents have also contended and the California Commission held (prior to this Court's decision in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 343 U. S. 414) that because the California Company generates power at hydroelectric plants licensed under Part I of the Federal Power Act, its rates are subject to regulation by California under Section 20 of Part I, and, accordingly, not by the Federal Commission under Part II. The identical argument was rejected by this Court in the *Penn Water* case at the last Term (as well as by the Court of Appeals in *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957). The California Commission's brief in opposition herein (p. 14) concedes this, but denies that it based its de-

cision on the ground stated. The denial does not seem accurately to reflect the reasoning of the California Commission's opinion (R. 15–16). But in any event the brief in opposition a page later (pp. 15–16) reasserts the argument which it says that Commision never made. The Company makes the same contention (Br. in Opp., pp. 15–17).

What the California Commission calls the "actual ground" for its decision (Br. in Opp. p. 15) is the multifold argument that (1) California but not Nevada has authority over the sales to the Navy and that therefore the case does not fall within the *Attleboro* gap in state power, (2) under Section 20 California is authorized to regulate the sales to the Navy, and (3) because of these two "facts," Section 201 of Part II operates to deny the Federal Commission authority. Since the last point seems in part to be the very one the California Commission denies making, it seems best to answer it, as well as the other two contentions.

We have already shown that the *Attleboro* doctrine barring state regulation of interstate wholesale rates related to all such rates—and that Congress so regarded it when the Federal Power Act was passed (see pp. 48–51, *supra*). We shall now deal with the contention still advanced by the Company (and by the California Commission on page 16 but not on page 14 of its brief in opposition) that Part II does not give

the Federal Commission jurisdiction over sales which states may regulate under Section 20 of Part I. We shall also argue that in any event, California has not satisfied the requisites of Section 20 of Part I and was, therefore, not authorized to act by that Section. If we are right as to the latter point, the Federal Commission has jurisdiction over the sales in question under Section 20 of Part I, independently of Part II, just as in the *Penn Water* case. The Commission so held (R. 29–31).

1. In *Penn Water* (343 U. S. 414) the company urged, as the California Commission ruled here, that the provisions of Part II are inapplicable to sales which are subject to potential state regulation under Section 20 of Part I, since Section 201 (a), Appendix A, *infra*, p. 76, declares that federal regulation shall "extend only to those matters which are not subject to regulation by the States." See Brief for Petitioners in No. 428, October Term, 1951, pp. 76–83, particularly p. 77. This Court, however, refused to adopt this construction of Part II, saying (343 U. S. at 418–419):

> * * * the language of Part II of the Act makes all "public utilities" subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command. A major purpose of the whole Act is to protect power consumers against excessive prices. Part I leaves

> regulation to the states under some circumstances. But, under § 20 of Part I the Federal Government is to protect the consumer if a state regulatory body does not exist or the "States are unable to agree * * * on the services to be rendered or on the rates or charges of payment therefor * * *." Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. *Part II therefore provides for a more expansive federal regulation than that authorized under Part I. It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation.* [Italics supplied.]

The *Penn Water* decision clearly demonstrates that the California Commission improperly treated the Power Commission's jurisdiction under Part II as limited by Part I, as the Ninth Circuit has held in the companion case (*California Electric Power Co.* v. *Federal Power Commission* (C. A. 9), Appendix B, *infra*, pp. 86–87). Since Congress has given the Federal Power Commission authority in Part II to regulate all interstate wholesale sales, the California Commission was not empowered to regulate the same transactions.

Respondent company argues that the *Penn Water* case is distinguishable because there the state commissions were unable to agree, as re-

quired under Section 20 if the Federal Commission was not to exercise jurisdiction (Br. in Opp., p. 16). But that was merely an alternative basis for this Court's decision. See 343 U. S. at p. 419. That does not make the main ground of decision less authoritative or persuasive. (We have not thought it necessary to repeat the full length argument on this point contained in our brief (pp. 124–137) in the *Penn Water* case.)

2. Even if it be assumed, contrary to the foregoing, that the Federal Commission does not have jurisdiction over these sales under Part II of the Federal Power Act, the California Commission erred in holding that Section 20 of Part I vested it with jurisdiction over the Company's sales to the Navy.[19] Section 20 authorizes the Federal Commission to regulate the rates charged by a licensee under Part I of the Act for electric energy sold in interstate commerce "whenever any of the

[19] While Section 20 is not expressly limited to retail sales in interstate commerce, we urge, if the question should be reached in the present case, that Section 20 does not extend to interstate sales for resale and, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act. See Brief for Federal Power Commission in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, Nos. 428, 429, October Term, 1951, pp. 124–129, 135–137. This Court did not find it necessary to reach these questions in the *Penn Water* case.

The Company's claim that Section 19, rather than Section 20, is applicable (R. 61–62), fails to recognize the exceptions carved out of Section 19, by Section 20, for interstate sales.

States directly concerned has not provided a commission or other authority to enforce [the Section's requirements] * * * within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates and charges of payment therefor, * * *." Far from supporting the California Commission's position, this Section places authority over the sales in this case in the Federal Commission.

(a) Although Section 20 permits regulation jointly by the "States directly concerned" of the interstate rates charged by licensees under Part I,[20] the California Commission ruled that Nevada, the State into which the energy was transmitted from California, and whose residents are the ultimate consumers, was not "directly concerned." According to the California Commission, this result flowed from the fact that *"no state can have jurisdiction over the Navy, an arm of the federal government.* Nevada has no jurisdiction over the rates the Navy pays to [the Company] nor over the rates the Navy charges its personnel and tenants" (italics in original) (R. 11, see also R. 13). Consequently, the California Commission held, Cali-

[20] Section 20, by stipulating inability to agree among the state agencies as the condition precedent to regulation by the Federal Commission, made plain that the state regulation intended was regulation by the states directly concerned as equals, not by one assuming the prerogative of regulation, and the other the role of petitioners or protestants, as has been urged by the Company and the California Commission.

rnia alone was "directly concerned" and its actions satisfied the conditions of Section 20 inasmuch as it was a "properly constituted authority" within that Section. The Federal Commission had ruled to the contrary, finding (R. 39) "The 'States directly concerned' within the meaning of Section 20 are the States of California and Nevada."

The California Commission's conclusion fails to recognize that the provisions of Section 20 apply, if at all, to the rates charged by the Company to the Navy, and not to the rates charged by the Navy to its tenants. And as to the Company's sale to the Navy, the doctrine of intergovernmental immunity may not be applicable. Compare *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U S. 285, with *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U. S. 261. Moreover, even if the doctrine of intergovernmental immunity were applicable, it would no more preclude regulation of the Company's sale to the Navy by Nevada than it would regulation of that sale by California. As far as that doctrine is concerned, the states' authority to regulate, if they have any, is equal. Intergovernmental immunity operates with an even hand on both California and Nevada. Indeed, if the doctrine of intergovernmental immunity is applicable, California, as well as Nevada, would be without any authority over the sale.

But passing intergovernmental immunity, it becomes clear that the Company's sale to the

Navy is of concern to Nevada as well as to California. The ultimate consumers live in Nevada. The Company makes other sales of electric energy in Nevada (R. 7, *supra*, p. 3), and the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada, since they are part of the Company's over-all costs and revenues which, of course, affect the rates charged to the other Nevada consumers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 334; cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23. Indeed, in these circumstances, Nevada's concern would be greater than that of California, if the latter's sole interest were, as asserted by the California Commission (R. 11), its control over the Company. Cf. *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184, fn. 2; *Pennsylvania* v. *West Virginia*, 262 U. S. 553. Since it is plain that Nevada's concern with the sale is at least equal to that of California, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised, as attempted here, by the California Commission acting alone.

(b) Clearly therefore, Nevada as well as California was a state concerned. Accordingly, California can exercise no jurisdiction under Section 20 unless the conditions prescribed in that section for state action are satisfied. Those conditions are that both states concerned shall have provided a Commission authorized to agree on the rate in-

volved, and that the states are able to agree. Neither of these conditions has been fulfilled.

Irrespective of whether California has provided in its Commission, "a commission or other authority to enforce the [Section's] requirements * * * within such State," Nevada has not provided any such Commission or other authority. This is clear from a mere reading of the statutes defining the jurisdiction of the Public Service Commission of Nevada. Thus, while Section 6147 of the Nevada Compiled Laws (1929) authorizes public utilities to purchase electricity from other suppliers and Section 6148 subjects the purchase contracts to the Nevada Commission's approval, Section 6149 expressly provides that in no circumstances shall the seller be deemed to be a public utility or subject to the jurisdiction of the Nevada Commission.[21]

[21] Section 6149 provides:

"SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada."

in the face of such objections, have the objections been sustained by the courts, and the courts' opinions which have noticed the objections have expressly overruled them. See *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 66–67, affirming 129 F. 2d 183, 186–189 (C. A. 3); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536; *Pennsylvania Water & Power Corp.* v. *Federal Power Commission*, 343 U. S. 414, 419–420, affirming 193 F. 2d 230, 240–241 (C. A. D. C.); *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958 (C. A. 2), certiorari denied, 319 U. S. 741. This unvaried line of decisions is consistent with this Court's earlier decisions denying to the states jurisdiction over the sales of mixtures.[30]

In the *Connecticut Light & Power* case, the Commission held that the company had been a

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Power Corporation, 5 F. P. C. 221, 235, 66 PUR (NS) 212, affirmed, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957; *Pennsylvania Water & Power Company*, 8 F. P. C. 1, 12–17, 82 PUR (NS) 193, affirmed, 193 F. 2d 230 (C. A. D. C.), affirmed, 343 U. S. 414; *Florida Public Utilities Company*, Opinion No. 189, issued January 25, 1950, pp. 11–15 (Mimeo.); *Arizona Edison Company, Inc.*, 84 PUR (NS) 3, affirmed, 194 F. 2d 679 (C. A. 9); *Western Light and Telephone Company, Inc.*, Opinion No. 199, issued September 20, 1950, pp. 1–3 (mimeo.), 87 PUR (NS) 311; *Wisconsin-Michigan Power Company*, 89 PUR (NS) 97, affirmed, 197 F. 2d 472 (C. A. 7).

[30] *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission* v. *Landon*, 249 U. S. 236. While those sales, both made in Kansas, consisted principally of gas pro-

"public utility" on the basis, in part, of a 14-mile transmission line in Connecticut, from which it sold electric energy, a part of which was transmitted and resold in New York by the purchaser for local distribution and consumption. While this Court set aside the Federal Commission's order on other grounds, it rejected the petitioning company's objection based on the relatively small amount of interstate energy involved as compared to the company's total system energy, saying (324 U. S. at pp. 535–536):

> * * * It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state during the time of the connection of Fishers Island with the Borough of Groton. Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. * * * The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate en-

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duced out-of-state, Kansas-produced gas constituted 6% at the time of the *Laydon case* (249 U. S. at p. 242) and 34% at the time of the *Missouri* case (No. 133, October Term, 1925, Record, p. 13).

ergy involved, and we do not think it would be appropriate to supply such a jurisdiction limitation by construction.

And in the *Penn Water* case, the company similarly claimed that since 83% of the energy delivered to its three Pennsylvania customers originated in Pennsylvania, and only 17% of that energy was generated in Maryland, the sale of the total was subject to state, rather than federal, regulation. This Court held that the Federal Commission "has complete authority to regulate all of the commingled power flow." (343 U. S. at 420.)

The principles of these cases, particularly of *Penn Water,* are fully applicable here. As stated by the Ninth Circuit in dealing with this very question in *California Electric Power Co.* v. *Federal Power Commission,* Appendix B, *infra,* p. 91:

> Here, as in the *Penn Water* case, the supposed nonjurisdictional part of the energy is indistinguishable at the point of sale from the remainder. Moreover, the amount resold is not constant, but fluctuating. The [Federal] Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. It seems clear, although [the Company] contends otherwise, that the only mode of segregation would be by separating the two loads and supplying each by an independent transmission line

from the point of metering and purchase to the Depot.

In virtually all sales of power to a public body, such as a municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance.

4. The sales are not within the exemption from federal regulation contained in section 201 (b) for "facilities used in local distribution."— Finally, the Company has suggested that since the sale to the Navy is made off a 55,000 volt line, which is also tapped to supply energy to a number of local communities which the Company serves at retail, the line is used in local distribution, and the sales to the Navy are within the exception contained in Section 201 (b) for "facilities used in local distribution."

It is clear, however, that supplying energy to these communities must involve tap lines from the 55,000 volt line and transformers to step down the voltage to a level usable in distribution to the private customers, since the power cannot be distributed directly into private homes at the very high long-distance transmission level of 55,000 volts. In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, this Court

held, on similar facts, that East Ohio's pipelines were not used in local distribution, saying (338 U. S. at 469–470):

> But what Congress must have meant by "facilities" for "local distribution" was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains.

The 55,000 volt line here involved plainly does not fall within this definition of "facilities used in local distribution."

Moreover, even if the facilities from which the sales were made were used in local distribution, it does not follow that the sales themselves would be within the exemption. For, as the Commission pointed out in *Wisconsin-Michigan Power Company*, affirmed, 197 F. 2d 472 (C. A. 9), petitions for certiorari pending, Nos. 291, 294, "nothing in the act makes our jurisdiction under Part II over sales of electric energy dependent upon the nature of the facilities involved in effecting the sale. * * * Under the statute the nature of facilities only applies to the determination of the status of an electric company as a 'public utility' under Part II." Thus, the Company's position is based on the fallacious assumption that the Federal Commission's jurisdiction over sales depends on the nature of the facilities from which the sales are made, whereas in fact the converse is true and

the character of the sales determines the status of the facilities from which they are made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be reversed.

WALTER J. CUMMINGS, JR.,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

DECEMBER 1952.

Finally and particularly significant, is the fact that the Nevada Commission has no authority to agree with the California Commission or other authority of California on a jointly-determined rate for the Company's sales to the Navy. Since Section 20 contemplates that the state commission or other authority has power so to agree in order to enforce the Section's provisions, Nevada obviously has not provided the type of commission contemplated by the statute, and this failure operates by the terms of the Section, to place jurisdiction over the sales in the Federal Commission.

Reading Section 20 as requiring a state authority to have at least such power is neither "bizarre" nor "strange and unheard of," as suggested by the Company and the California Commission. Both the Pennsylvania and Maryland Commissions involved in *Pennsylvania Water & Power Corp.* v. *Federal Power Commission,* 343 U. S. 414 (see also, *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957), had expressly been given such power by the respective state statutes.[22] Significantly, the only court cases prior to this one in which licensees have claimed

[22] Pennsylvania Public Utility Law, Section 913 (a), reads as follows:

"The commission shall have full power and authority to make joint investigations, hold joint hearings within or without the Commonwealth, and issue joint or concurrent orders in conjunction or concurrence with any official, board, com-

that state commissions had jurisdiction under Section 20 have come from those two states.[23] There thus can be no question that the Nevada Commission is not constituted with any responsibility or power of any kind as to regulation of the Company's rate to the Navy or Mineral County. The Chairman clearly so indicated in the joint hearing before the two Commissions,[24] Company counsel voluntarily so stipulated at the hearing,[25] and the Company points to nothing in the record or in the Nevada Constitution, statutes or decisions as

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mission, or agency of any state or of the United States, whether in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or compacts between states or under the concurrent power of states to regulate the interstate commerce, or as an agency of the Federal Government, or otherwise."

Maryland Public Service Commission Law, Section 348, reads as follows:

"The Commission shall have full power and authority to make joint investigations, hold joint hearings, and issue joint or concurrent orders in conjunction or concurrence with any official board or commission of any state or of the United States, whether in the holding of such investigations or hearings or in the making of such orders the Commission shall function under agreements or compacts between states, or under the concurrent power of states to regulate interstate commerce, or as an agency of the Federal Government, or otherwise."

[23] *Safe Harbor W. P. Corp* v. *Federal Power Commission*, 124 F. 2d 800 (C. A. 3), certiorari denied, 316 U. S. 663. *Safe Harbor W. P. Corp.* v. *Federal Power Commission*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957; *Penn W. & P. Co.* v. *Federal Power Commission*, 343 U. S. 414.

[24] No. 495, this Term, Tr. of Record, p. 153.

[25] *Id.* at 245-246.

showing the contrary. The Federal Commission was, therefore, abundantly warranted in finding as it did in its opinion (R. 31):

> It is apparent that the Public Service Commission of Nevada is without authority, with respect to rates charged Mineral County or the Navy, and therefore cannot be regarded as a "commission or other authority to enforce the requirements of" Section 20, and it follows that no further showing is required to support the conclusion that it is *impossible for a properly constituted authority of Nevada to agree with the California Commission* concerning the rates charged Mineral County and the Navy.

Finally, since no Nevada authority has in fact agreed to California's rates (Mineral County has disagreed), the rates would be ineffective under Section 20 even if some Nevada agency could lawfully have agreed.

D. OTHER CONTENTIONS ADVANCED BY THE COMPANY ARE INSUBSTANTIAL

In addition to the grounds relied upon by the California Commission, the Company has advanced other arguments in attacking the jurisdiction of the Federal Commission in the proceeding before the Ninth Circuit (see Appendix B, *infra*, p. 83). These contentions, we shall show, have no merit.

1. *The sales to the Navy are sales for resale despite the inability of Nevada to regulate rates at which the Navy resells to its tenants.*—The

Company's argument that the purpose of Part II was limited to enabling "State agencies to start with a fair wholesale rate in regulating the local distribution rate" and that Part II should, accordingly, be held inapplicable because the Navy's local distribution rate is not regulated by a state agency, is not supported by any citation of authority. Obviously the Company has cut its coat to fit its cloth. The contention is in conflict with the Federal Commission's consistent interpretation of the rate regulatory provisions as being intended for the benefit of consumers, including those served by municipal distributing utilities, which are usually not regulated by state agencies. It also ignores the fact that at the time of the enactment of Part II in 1935, even privately owned local distributing utilities' rates were not subject to regulation by state agencies in seven states,[26] yet it would scarcely be contended that there were not "wholesale sales" subject to the Federal Commission jurisdiction in those seven states.

Finally, the Company's argument overlooks the significant fact that here, unlike the case of a wholesale sale to a private distributing company, the energy purchased from the Company is paid for by the Navy out of public funds. Accordingly, while the public interest is concerned with the wholesale rate to the private distributing company primarily because of its effect upon the rate charged the ultimate consumers, the public interest is involved in the Company's rate to the

[26] House Hearings, H. R. 5423, 74th Cong., 1st Sess., p. 496.

Navy, regardless of the resale rate charged by the Navy, since once the rate charged by the Company is paid, the burden, if the rate be excessive, inevitably falls either on the ultimate consumers of the energy or on the nation's taxpayers. See *California Electric Power Co.* v. *Federal Power Commission*, Appendix B, *infra*, p. 90.

2. *A contract provision for resale is unnecessary to constitute the sales to the Navy "sales for resale."*—The Company has further urged that because the contract between it and the Navy does not specifically provide for resale, but merely that the energy was sold "for the use of the Government's Naval Ammunition Depot, Hawthorne, Nevada," the transaction cannot be a "sale for resale" within the meaning of Section 201 (d). See, *e. g.*, R. 59–60. As has been pointed out, the Navy's resales were to its employees residing at the Depot and to the concessionaires providing services at the Depot for these tenant employees.

We think it immaterial whether or not the resales are authorized under the contract—although until this litigation, the Company seems never to have made any objection to the Navy's use of the power. There is no doubt—and the Company does not deny—that it knew of these resales.[27] It is sufficient, we submit, for the purposes of

[27] The Federal Commission found (R. 32):

"As previously shown, the undisputed fact is that the energy is in part resold by Navy *with Respondent's knowledge*, at 1.5¢ per kwh to business concessions and residents occupying the Navy's housing project." [Italics added.]

Section 201 (b) and (d) that the original seller know that the energy is being resold. There is nothing in Sections 201 (b) and (d) which makes the Federal Commission's jurisdiction under Part II dependent upon the terms used in contractual agreements. It is, of course, obvious that contracts can be phrased to conform to the whims or objectives of either party rather than the facts as they exist. Indeed, the contrary conclusion urged by the Company would place the seller in the position of being able to avoid the burdens of federal regulation, while engaging in the very activities which Part II was designed to regulate. Plainly, therefore, "an express agreement or an intention on the Company's part that the energy shall be resold is [not] required in order to confer jurisdiction." *California Electric Power Company* v. *Federal Power Commission*, Appendix B, *infra*, p. 89. In these circumstances, since the Company, in delivering the energy to the Navy, was fully aware that the Navy was reselling it to its tenants and concessionaires, the sales to the Navy were clearly "made with a view to the * * * resale" (*Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, 62; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225) and as such, were subject to federal regulation under Part II. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958–960 (C. A. 2), certiorari denied, 319 U. S. 741; cf. *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324

U. S. 515.[28] In *Jersey Central Co.* v. *Federal Power Comm.*, 319 U. S. 61, 69, this Court answered a contention by a selling company that the buyer's transmission of part of the energy out of the state was beyond the seller's control and that hence the seller's own transmission was not "in interstate commerce" because not voluntary or intentional, saying:

> In *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83, 86, this Court held in interstate commerce the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. We see no distinction between a sale at or before reaching the state line.

3. *The sales are "sales for resale" although only 25% is resold by the Navy.*—The Company has also contended that since only about 25% of the total energy sold to the Navy is resold by it, the status of the larger percentage should determine which of the two agencies, State or Federal, has jurisdiction over the whole. Alternatively, the Company has urged that jurisdiction over the sale should be so divided that the Federal Commis-

[28] In the *Connecticut* case, where the Company sold electric energy to the Borough of Groton, which, with the knowledge of the Company, resold a part of the energy, it was accepted without question on this aspect of the matter, that the sale was a "sale for resale" within Section 201 (d).

sion's authority embrace only the portion of the energy which is resold. Since the California Commission did not deal with this claim, its opinion contains no findings relative to the proportion resold by the Navy. On the basis of the undisputed evidence contained in the record made at the joint hearings, however, the Federal Commission found (R. 28):

> * * * For the period of 1943 to 1948, inclusive, the percentage of energy resold by the Navy (of the total purchased and generated by Navy) ranged from 15.5% to 28.6%, the average being 18.7%. In 1949, approximately 24% of the 6,423,272 kwh purchased and generated by the Navy was resold to the business concessions and residents occupying the Navy's low-cost defense housing project (1,170 units located on the reservation).

These contentions seek to raise objections to the Federal Commission's jurisdiction over mixed and commingled energy, which have been consistently rejected by the Federal Power Commission and the Court.[29] Indeed, in no instance where the Federal Commission has asserted jurisdiction,

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[29] *E. g.*, *Kansas Gas and Electric Company*, 1 F. P. C. 536, 543–544, 26 PUR (NS) 259; *Hartford Electric Light Company*, 2 F. P. C. 359, 365–366, 37 PUR (NS) 193, affirmed, 131 F. 2d 953 (C. A. 2), certiorari denied, 319 U. S. 741; *Chicago District Electric Generating Corporation*, 2 F. P. C. 412, 416, 39 PUR (NS) 263; *Connecticut Light & Power Company*, 3 F. P. C. 132, 141–142, 44 PUR (NS) 170, set aside on other aspects, 324 U. S. 515; *Safe Harbor Water*

they shall control until and unless superseded by new rates filed by the Company or by rates fixed by the Commission. Aside from some minor, and, we think, inconsequential objections of a procedural nature, the issue posed by the petition is whether the rates are subject to the Commission's filing requirements, or whether, as the petitioner contends, the Public Utilities Commission of California, either alone or in conjunction with the Public Service Commission of Nevada, has jurisdiction over the rates charged these customers.

Petitioner owns and operates an interconnected system for the generation and distribution of electric power in California and Nevada. The power sold to the Navy and to Mineral County is generated in and transmitted from petitioner's Northern Division plants in California.[1] Most of it comes from three plants in petitioner's Mono Basin system, these being hydroelectric projects licensed by the Commission under § 4 (e) of Part I of the Federal Power Act to operate on the public lands. The energy sold the Navy is delivered to Navy-owned transmission lines at petitioner's Mill Creek plant in Mono County, California. From there it flows through the Navy's lines across the California-Nevada state boundary to the Naval Depot at Hawthorne, Nevada. Similarly the electric energy sold Mineral County is delivered at the Mill Creek plant to Mineral County, which transmits the energy across the state border over its own line

[1] The Commission found that petitioner's facilities utilized in these sales are facilities used for the transmission of electric energy in bulk, not for local distribution.

for resale to consumers in Mineral County. These lines in each instance are 55,000 volt transmission lines. At Hawthorne, Nevada, the energy in both instances is transformed to lower voltages for distribution.[2]

As regards the Navy, the power it purchases or generates is used to operate the Navy's various facilities at the Depot, and, in addition, to supply the needs of the occupants of a housing project which was built for and is occupied by civilian employees of the Depot, as well as the energy needs of the operators of the Depot's various concessions. Each housing or business unit has a separate meter, and the occupant thereof is billed and required to pay for the energy which he consumes. From 1943 to 1948,[3] between 15.4% and 28.6% of the Navy's yearly total power supply was resold to these residents and business concessions, the amount resold averaging 18.7% of the yearly total. By contract entered into in 1943 petitioner and the Navy agreed upon the rates to be charged for the energy furnished. This contract was not filed with the Power Commission as a rate schedule, but petitioner charged the contract rates until 1948, when it obtained from the California Public Utilities Commission a rate increase in respect of certain designated customers, including Navy,

[2] In addition to the energy purchased from petitioner, the Navy generates a small part (approximately 7.5% of the amount purchased from the petitioner) of its own requirements on three Diesel generators located at the Naval Depot.

[3] The present proceeding was begun by order to show cause issued February 15, 1950.

whom petitioner was serving under special contracts.

The properties and facilities of the Mineral County power system belong to and are operated by the County under the direction of its Board of Commissioners who ex-officio constitute the board of managers of the county-owned facility. Petitioner has sold to the County the power required for the system under a series of three-year contracts providing that at rates set forth in the contract petitioner would furnish and the County would purchase all of the energy required by the latter for resale and distribution to the ultimate consumers in the state of Nevada.

Petitioner argues that since it is a licensee under Part I of the Federal Power Act its rates to Navy and to Mineral County are to be regulated by the Commissions of Nevada and California under § 20 of the Act, and that they are not subject to regulation under Part II, §§ 201, 205 and 206.[4] The contention is not different from that made and rejected in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 418, where the Court said that Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which necessarily must be

[4] The Commission found that the Nevada Commission has not been given jurisdiction by Nevada statutes over petitioner's charges to Mineral County or to the United States as contemplated by §§ 19 or 20, hence alternative jurisdiction is by those sections conferred upon the Federal Power Commission. Petitioner assails the finding, but we think it unnecessary to resolve the dispute.

accomplished by the Federal government. It was thought that the program formulated by the Act would be hindered, not helped, if Part I licensees were held impliedly exempt from the more expansive regulation provided by Part II.

The transactions in question manifestly constitute sales by a public utility of electric energy in interstate commerce. It is of no moment that petitioner's facilities for the transmission and sale of the energy are all located in California and that those used to transmit it across the line into Nevada are owned by the purchasers of the energy. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Federal Power Commission* v. *Arizona Edison Co.*, 9 Cir., 194 F. 2d 679.[5] Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. *Federal Power Commission* v. *Arizona Edison Co., supra*, p. 681. The question is not whether the United States is in interstate commerce, but whether petitioner is. But it is urged that sales to the United States or to Mineral County are not at wholesale within the Act's intendment since § 201 (d) defines sales at wholesale as sales to any *person* for resale, and neither the United States nor Mineral County is by definition a person. Sections 3 (4) and 3 (3) of Part I and 201 (f) of Part II of the Act are appealed to in support of the argument. Section 3 (4) defines the word "person" as meaning "an

[5] Sec. 201 (c) of the Act provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof. . . ."

individual or a corporation," and § 3 (3), defining "corporation," excludes municipalities from the definition. Section 201 (f) will be noticed in a moment.

The argument here predicated on § 201 (d) was made to the Seventh Circuit in the recent case of *Wisconsin-Michigan Power Co.* v. *Federal Power Commission,* 197 F. 2d 472, where a number of municipalities were involved as purchasers for resale. Upon consideration of the legislative history and gradual development of the several provisions of the Act, together with the policy of the legislation as a whole, the court concluded (p. 479) that Congress did not intend to exclude from its definition of sales at wholesale sales to municipalities for resale. It thought that to construe the Act as the power company contended would be to neglect other provisions, such as §§ 306 and 313 (a), relating to complaints by municipalities, and to leave those bodies open to the rankest discrimination.

We agree with the Seventh Circuit that reference back to the early definitions contained in Part I should not be permitted to thwart the general policy manifested by the statute as a whole. It seems more than probable that the significance of those definitions was overlooked in the later formulation of Part II.

Nor is § 201 (f) of help to the petitioner. This section states that "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State. * * *" It is clear that the intended exclusion or exemption is from the regulatory burdens of the statute. For the purposes of the

Act these public bodies are simply not deemed to be public utilities. But it would be inconsistent with the policy of the legislation, as well as with certain of its provisions already mentioned, to hold that, as wholesale purchasers of power, they are excluded from the benefits of the regulation of the utilities from which they buy. The entire thrust of Part II is toward the seller at wholesale, not the buyer.

Petitioner's sales to Mineral County are substantially in their entirety sales of energy for resale. But in respect of the United States it is contended, on several grounds, that the sale to the Navy is not for resale within the intendment of the Act. The principal of these grounds is that only a minor percentage of the amount sold the Navy was resold by it.[6] Another objection to Commission jurisdiction is that the Navy resells at a low rate; and a third is that petitioner's contract made no reference to resale and that petitioner did not intend to sell for resale.

We turn first to the latter objections. The Commission found as a fact that the energy in question was resold to ultimate consumers and consumed in Nevada. It found also that petitioner had knowledge of the resales. We are not persuaded that an express agreement or an intention on the Company's part that the energy shall be resold is required in order to confer jurisdiction. It appears without dispute that the only reason the service was not rendered by the local electric utility (Mineral County) was the latter's financial inability to undertake the busi-

[6] As observed above, the actual percentage of power resold fluctuated rather widely, averaging 18.7% of the yearly total.

ness, hence the necessity of the Navy's action. As to the rate at which the Navy sells, we agree with the Commission that the public interest is involved in the Company's rate to the Navy, whether the burden of possibly excessive rates were to fall on the ultimate consumer of the energy or on the nation's taxpayers.

Petitioner's argument of lack of jurisdiction based on the percentage of power resold seems finally to have resolved itself down to the proposition that the percentage consumed by the Navy should be held subject to State regulation, and only the part resold regarded as subject to regulation by the Commission. In rebuttal the Commission cites *Jersey Central P. & L. Co.* v. *Federal Power Commission,* 319 U. S. 61; *Connecticut L. & P. Co.* v. *Federal Power Commission,* 324 U. S. 515; and *Hartford E. L. Co.* v. *Federal Power Commission,* 2 Cir., 131 F. 2d 953, certiorari denied, 319 U. S. 741, dealing with commingled flows of outstate and intrastate energy. It is unnecessary to discuss these cases in view of the very recent decision in *Pennsylvania Water & Power Co.* v. *Federal Power Commission, supra,* which deals with the same problem. Although the situations are not identical, we are inclined to think that the *Penn Water* case in principle disposes of petitioner's argument. There the power company contested the Commission's jurisdiction to regulate its sales in Pennsylvania to Pennsylvania utilities on the ground that 83% of the energy so sold was intrastate energy developed in Pennsylvania, only 17% coming from Maryland. The Court said that the Commission "has

APPENDIX A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regu-

complete authority to regulate all this commingled power flow."

Here, as in the *Penn Water* case, the supposed nonjurisdictional part of the energy is indistinguishable at the point of sale from the remainder. Moreover the amount resold is not constant, but fluctuating. The Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. It seems clear, although petitioner contends otherwise, that the only mode of segregation would be by separating the two loads and supplying each by an independent transmission line from the point of metering and purchase to the Depot.

In virtually all sales of power to a public body, such as a municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance.

The Commission's order is affirmed.

(Endorsed:) Opinion. Filed Oct. 14, 1952. Paul P. O'Brien, Clerk.

lation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, * * * shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and

declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hy-

droelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * * * * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be

made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in

such manner and by such means as it shall find proper.

* * * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of

such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 12,987—October 14, 1952

CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AND

COUNTY OF MINERAL, STATE OF NEVADA, AND UNITED STATES OF AMERICA, INTERVENORS

UPON PETITION FOR REVIEW OF AN ORDER OF FEDERAL POWER COMMISSION

Before: MATHEWS, HEALY, and ORR, Circuit Judges.

HEALY, Circuit Judge.

California Electric Power Company petitions for review of an order of the Federal Power Commission directing it to cease and desist from charging two Nevada customers (the Department of the Navy and Mineral County, Nevada) any rate other than "filed rates" for electric energy it sells those customers.

The Commission's order does not assume to perpetuate the "filed rates," but provides only that

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IN THE

Supreme Court of the United States

October Term, 1952.
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for California Electric Power Company.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPENDIX C

In the United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11224

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 11225

WISCONSIN POWER AND LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Decided November 13, 1952

Before CLARK, PROCTOR AND WASHINGTON, Circuit Judges:

WASHINGTON, *Circuit Judge:* On July 12, 1951, the Federal Power Commission ordered the Wisconsin Power and Light Company to file rate

IN THE

Supreme Court of the United States

October Term, 1952.
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

Statement of Facts.

California Electric Power Company (Company) is a public utility electrical corporation generating, transmitting and distributing electric energy in the State of California and also a public utility engaged in the transmission and distribution of electric energy in Nye and Esmeralda Counties, Nevada, which latter business and the lines used therefor are distinct from the delivery of electric energy to the United States Navy (Navy) in California for the use of Hawthorne Ammunition Depot at Hawthorne, Mineral County, Nevada.

Company is a licensee under Part I of Federal Act (Act)[1] holding licenses for seven hydro electric power plants in Mono and Inyo Counties, California. At one of

[1] 49 Stat. 863; 16 U. S. C. 791, *et seq.*

schedules for the Company's electric service to four municipalities in southwestern Wisconsin. The Company petitioned this court under section 313 (b) of the Federal Power Act, 16 U. S. C. § 825*l* (b), to review and set aside the Commission's order of July 12, as well as another issued by it on August 27, 1951, denying the Company's application for a rehearing. A like petition was filed by the State of Wisconsin and the Public Service Commission of Wisconsin. Proceedings on these petitions were consolidated by order of this court.

We think the petitioners' principal contentions are disposed of by the able opinion of the Seventh Circuit in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 (7th Cir. 1952), a case which arose upon strikingly similar facts. There, as here, the issue was whether the Commission had jurisdiction, pursuant to section 205 of the Federal Power Act, 16 U. S. C. § 824d, over the rates charged certain municipalities. In each case the petitioning company sold to the municipalities a supply of electric energy, some of which originated out of state, for resale by them to their residents. In each it was urged, on similar grounds, that this business was not covered by section 205. It is our view, as it was the Seventh Circuit's in the *Wisconsin-Michigan* case, (1) that these are sales at wholesale[1] within the meaning of the definition contained in section 201 (d); (2) that

[1] The Commission made no finding that these sales were "national in character." The Company urges that such a finding was necessary. We disagree. Where interstate transmission is involved; the controlling distinction is be-

the section 201 (b) exemption from Commission jurisdiction of "facilities used in local distribution" is inapplicable here, and the Company therefore is a public utility within the meaning of the definition in section 201 (e); and (3) that a history of previously unchallenged regulation by the State does not oust the Commission of jurisdiction. The reasoning given by Judge Lindley in support of his conclusions develops the views expressed by this court in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 89 U. S. App. D. C. 235, 193 F. 2d 230, 239–41 (1951), aff'd 343 U. S. 414 (1952). See also *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679 (9th Cir. 1952); *California Electric Power Co.* v. *Federal Power Commission, et al.*, — F. 2d — (9th Cir., Oct. 14, 1952). Under the circumstances, we think it would serve no useful purpose to endeavor to supplement

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tween wholesale and retail sales. See *Panhandle Co.* v. *Michigan Commission*, 341 U. S. 329, 334 (1951); *Panhandle Pipe Line Co.* v. *Commission*, 332 U. S. 507, 517 (1947); *Colorado-Wyoming Co.* v. *Commission*, 324 U. S. 626, 630 (1945). In none of the cases just cited was a finding made, or deemed necessary, that the sales in question were national rather than local in character. And the fact "that the amount of out-of-state energy is small in proportion to the total amount of energy sold is unimportant." *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472 at 478. Nor does "wholesale" mean a large quantity: *Panhandle Pipe Line Co.* v. *Commission*, *supra*, 332 U. S. 507 at 515n. In the instant case, the Commission found, among other things, that "It is necessary and appropriate for the purposes of the Federal Power Act * * *" that the Commission order the Company to file a schedule of rates for the sales in question. (R 1205)

Judge Lindley's discussion of the governing legal principles.

A procedural point urged by the petitioner Company requires consideration, however. It contends that the Commission entered the order of July 12, 1951, without according the Company due process of law. The basis of its contention is that it did not acquire the distribution facilities here involved until after the close of the Commission's hearings; that it "has had no opportunity since it became the owner of the * * * property, to be heard with reference to its operation of said property," and that the Commission therefore was not justified in finding it to be a "public utility," subject to the filing requirements of the Act.

The sequence of events underlying this contention is as follows: When the hearing before the Federal Power Commission Examiner closed on June 9, 1950, the Company was not yet the owner of the facilities in question. But it had previously made application to the Commission for authorization (under section 203 of the Federal Power Act) to acquire them (R. 704–808). As a result of this application it had been designated by the Commission as an additional respondent in the original proceeding, and ordered to show cause why it should not file rate schedules "if, when, and as the acquisition * * * is approved and authorized" (R. 1047). The Company did not appear at the hearing or offer evidence. In its return to the show-cause order it simply denied that the Commission had any jurisdiction to require it to file schedules. The acquisition was approved by order of the Commission on June 21, 1950. The

Company actually took over the facilities on June 30, 1950, a fact of which it notified the Commission by formal report on July 31. The Examiner took notice of this fact in his decision, announced on March 14, 1951. He found that "there is at least a presumption that the existing method of operation [i. e., securing the electricity sold from out-of-state] * * * will be continued * * * ," and ordered the Company to file rate schedules for its service to the municipalities. The Company filed exceptions to this decision, as will more fully appear, but did not except to the taking of notice. The Commission's decision was filed on July 12, 1951. It also took "official notice" of the Company's report of the completion of the acquisition, "pursuant to" its approval order of June 21, which it interpreted as requiring that energy for the municipalities continue to come from the out-of-state source during the next two years. On that basis, it confirmed the filing requirement.

The Company now complains of this taking of notice and of alleged misinterpretation by the Commission of the terms on which it approved the acquisition. Its theory is that these actions were essential to the finding that it is a "public utility," and hence that this finding, essential to Commission jurisdiction, is unjustifiable. The Company further urges that it should have been heard upon the allegations of its petition for rehearing. These were to the effect that, "pursuant to a predetermined plan to supply the four municipalities" with Wisconsin energy, three of them had received no out-of-state energy since twelve days after the transfer of ownership, except in emer-

gencies.[2] The Company appears to contend that these allegations, if true, required that the Commission withdraw or modify its order of July 12, 1951.

We think the Company's arguments quite untenable. In the first place, there are many occasions—and this would seem to be one of them—on which a regulatory agency can and should take official notice of the reports filed with it by a regulated company. See *Market Street R. Co. v. Railroad Commission*, 324 U. S. 548, 562 (1945); cf. Administrative Procedure Act § 7 (d), 5 U. S. C. § 1006 (d). Secondly, the objection—if any—to the taking of official notice by the Examiner was waived by failure to file appropriate exception under the Commission's rules;[3] the Company thereafter could not complain if the Commission likewise took official notice. Thirdly, the Commission's finding in its order of July 12, 1951—that the Company is subject to the filing requirements—is amply justified without need to rely on official notice of the report of July 31, 1950. In its exceptions to the Examiner's decision in the spring of 1951 the Company repre-

[2] As to the fourth municipality, the Company alleges in its petition to this court that that town too is now served by power from Wisconsin sources. But that fact—if it be a fact—cannot under the circumstances be raised for the first time in this court. See Section 313 (b) of the Federal Power Act, 16 U. S. C. § 825*l* (b).

[3] Section 1.31 (c) of the Commission's General Rules and Regulations provides that "Failure to file exceptions within the time allowed under this section shall constitute a waiver of all objections to the intermediate decision served * * * and any matter not included in such exceptions shall be deemed waived."

sented to the Commission that it was operating the facilities in question in the same way its predecessor had. At that time the Company affirmatively stated that the power then being sold to the municipalities was coming in part from Illinois and that title passed to the Company at the state line (R. 1141, 1142, 1145). And it requested the Commission to make findings to that effect (R. 1150–51). Such findings were included in the Commission order of July 12, 1951. Fourthly, these representations also dispose of the Company's contentions with respect to misinterpretation of the terms of the acquisition: the misconstruction, if any, was harmless, since it was not the only basis for concluding that interstate sales were being made.

Nor did the Commission abuse its discretion when it denied the petition for rehearing. If the actual facts are as there set forth, i. e., that three of the towns had for some time been connected to Wisconsin power sources, the Company should have given the Commission prompt notice of the change. Instead, it delayed for more than a year in doing so, and in the interval made contrary representations to the Commission. Orderly dispatch of administrative business—as of judicial business—demands that parties give timely notice of changed positions or changed facts. If they do not, they must take the consequences. See *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541, 546 (1912). Under the circumstances, we think the Commission acted within its powers.

The orders of the Commission will accordingly be

Affirmed.

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The question is: Does Federal Power Commission have any authority to supersede the contracting power of the Navy and can it in any way be aided in assuming that power by representations of the Attorney General or the Solicitor General?

There is no such authority. Certainly the very general definition of interstate commerce found in Federal Power Act, accompanied by the declaration that none of the provisions of Part II apply to the Navy does not afford it.

IV.

Company's Sale to Navy Is Not a Sale at Wholesale, That Is "to Any Person for Resale" and Hence Is Not Subject to the Jurisdiction of Federal Power Commission.

It is admitted by Petitioner that Company's sale to Navy is not subject to Federal Power Commission's jurisdiction unless it is a sale at wholesale, that is, "for resale."[5]

It is also admitted that, under the literal terms of the Act,[6] the Navy is not a person, and sale to Navy is not a sale of electric energy "to any person," so as to come under Federal Power Commission jurisdiction.

It has been contended by Federal Power Commission that, generally throughout the Act, the term "person," does not include the United States, its departments or agencies. In a brief filed by F.P.C. in August, 1951, in the United States Court of Appeals for the 4th Circuit in Nos. 6273 and 6274, *United States ex rel. Chapman v. Federal Power Com. and Virginia E. & P. Co.* (later decided 191 F. 2d

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[5]Act, Section 201(b) and (d).

[6]Section 3(3), (4), (7); Section 201(d).

796, Cert. granted 72 S. Ct. 1034), this point was demonstrated in language so convincing that we quote and adopt it as our own.

"'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.

"Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T.V.A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T.V.A. and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being

looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *.

"From this action, it is abundantly clear that the Committee considered that 'person,' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner argues, however (Pet. pp. 13-18), that this Court should strike out and ignore the words, "to any person," as they occur in Section 201(d) of the Act, because they were inserted by amendment as the Bill passed through Congress and no mention of the critical words was made in the Committee reports. This seems to be carrying legislative history beyond the limit of tolerance.

The provisions referred to are not ambiguous or uncertain, but are clear, specific, and capable of enforcement. There is no occasion to resort to legislative history.

Petitioner's contention virtually announces a general rule that, *where a bill is amended in its legislative course, no critical words inserted by the amendment will be given effect by the Courts unless the amendment is accompanied by a Committee report expressly mentioning an intent to insert such critical words.*

The point made by Petitioner is obviously one which should be addressed only to Congress.

The decision in *Wisconsin-Michigan Power Co. v. Fed. Power Com.*, 197 F. 2d 472 (C. A. 7), *loc. cit.* 479, relied upon by Petitioner, is not persuasive. That Court seems to have assumed too much, viz., that "the apparent inconsistency was an oversight," and that the "'slip' was inadvertent." Moreover, in placing its decision on "the con-

tinued construction of the Act by the Commission," that Court was directly in conflict with the District of Columbia Circuit in *Pacific P. & L. Co. v. Fed. Power Com.*, 184 F. 2d 272, holding that twenty years of administrative construction by the issuance of numerous licenses for minor lines under the claim of jurisdiction to do so did not alter the statute, though the meaning of the statute was, to say the least, debatable.

Petitioner argues further that this Court should disregard the words "to any person," because to give them effect would be unreasonable in that it would deny to the government the benefit of one phase of federal regulation. But this is a mere conclusion of the pleader, and defeats itself, since it is admitted that Congress did deny to the government some degree of federal regulation. For it is admitted that, except for the alleged "resale" of energy to its employees, and assuming that such is only a part of the operation of the Depot, Navy would not, under the Act, be entitled to any protection from federal regulation. This is so, because rates for energy sold in interstate commerce for consumption by the purchaser are not subject to Federal Power Commission jurisdiction.[7]

The argument that *Attleboro*, 273 U. S. 83 exposed the gap in regulation as to wholesale sales to both public utilities and non-public utilities and, hence, the Act was intended to close the gap as to one as well as to the other, fails to convince. There are three possible gaps: (1) sales

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[7] *Fed. Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502; *Panhandle Eastern Pipe Line Co. v. Public Serv. Com.*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co. v. Fed. Power Com.*, 341 U. S. 329; *Connecticut L. & P. Co. v. Fed. Power Com.*, 324 U. S. 515, 529.

to public utilities for resale; (2) sales to governmental agencies for resale, and (3) sales to any one for consumption. The act did not close the gap as to (3), why must it have closed the gap as to (2)? Actually, Section 201 (a), (b) and (d) closes only the gap exposed in *Attleboro*, that is, (1) above, or sale in interstate commerce to a privately owned utility for resale. The inclusion of anything more rests entirely upon the wish or desire of the Petitioner or Federal Power Commission, and cannot be read into the Act by an impartial examination.

The intent of Congress to exclude sales to the United States Navy and other departments and agencies of the United States through the definition of the word "person," in Section 201(d) is clear, for it conforms to the same intent manifested in the exclusion of those agencies in Section 201(f), and both results comport with the undoubted intent of Congress not to transfer to Federal Power Commission the contracting autonomy of all such agencies as the Navy, Army, Air Force, Tennessee Valley Authority, Reclamation Bureau, and Bonneville Power Authority.

The last named three are avowedly engaged in the sale and distribution of electric energy on a large scale, and it is utterly impossible to believe that Congress intended that, when any of them should purchase, from an interstate utility, energy for resale, the rate should be fixed by Federal Power Commission instead of those otherwise autonomous agencies.

The jurisdiction of Federal Power Commission rests upon express delegation by Congress. The authority of the Navy Department likewise rests upon express delegation by Congress. The powers of neither one nor the other can be broadened or narrowed by consent, request, or agreement between them.

V.

Under the Facts of This Case, Company's Rates Are Subject to Regulation Solely by a State Commission or State Commissions Under Sections 19 and 20 of the Act.

Sections 19 and 20 provide for the regulation of all of a licensee's rates, not merely those for the sale of power from licensed projects. Section 19 provides that every licensee which is a public service corporation (some are not) shall be subject to regulation by the State where the service is rendered or the rate charged, in this case, California. Section 20 provides that, if such power or any part thereof enters into interstate commerce, and if any of the states directly concerned has not provided a Commission to regulate the rates or such Commissions are unable to agree, then, jurisdiction is conferred on Federal Power Commission.

Under those provisions, it is immaterial whether or not interstate commerce be involved, for in neither event does Federal Power Commission have jurisdiction, there being no evidence in this case that any state commissions are unable to agree.

Since, under the facts of this case, regulation by a state or states has been provided for, Federal Power Commission has no jurisdiction under Part II of the Act, it being provided in Section 201(a) that federal regulation under that part is "to extend only to those matters which are not subject to regulation by the States."

It will be observed that, as applied to various conditions, Sections 19 and 20 provide for some regulation of interstate commerce by States and for some regulation of intrastate commerce by federal agency. The explanation of

what ordinarily would not conform to the powers of Congress under the Commerce clause lies in the fact that Part I of the Act was not enacted primarily under the commerce clause, but under Section 3 of Article IV of the Constitution, giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property of the United States."

The Company's licenses are 50-year contracts in the nature of leases of public lands, founded on mutual benefits and detriments to the parties. In making such disposition of the property of the United States, Congress can attach any condition it wishes[8] unrestricted by the Commerce Clause as to distinctions between intrastate and interstate commerce. As a term of the lease, it could have made all commerce resulting from the operation of the projects, both intrastate and interstate, subject to state regulation, or all subject to federal regulation, or it could provide, as it in fact did provide, that, in the first instance, all rates should be subject to State regulation, which, under certain conditions, should give way to federal regulation.

Pennsylvania Water & Power Co., 343 U. S. 414, and *Safe Harbor Water Power Co.*, 179 F. 2d 179 (C. A. 3), (Certiorari denied 339 U. S. 957), are not contrary to but confirmatory of these principles. In both cases, interstate commerce being indisputably involved, it was found that the State Commissions were unable to agree, thus, under the express provisions of Section 20 of the Act, transferring jurisdiction to Federal Power Commission.

We understand that a judicial decision is authoritative only for the law as applied to the facts of that case. There

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[8]*Camfield v. United States*, 167 U. S. 518; *Light v. United States*, 220 U. S. 523.

these plants (Mill Creek), Company delivers energy to Navy and Navy transmits the same over its own transmission line to its Naval Ammunition Depot at Hawthorne, Mineral County, Nevada.

The only contract ever existing between Company and Navy for such service was that dated July 1, 1943, in which Company agreed to sell and Navy agreed to purchase electric energy "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada," during the fiscal year 1944, and thereafter until 60 days' notice of termination by either party to the other.

In accordance with the terms of the Contract, Company terminated the contract as of October 1, 1948, and thereafter asserted charges under its P-2 Schedule which had been approved by California Public Utilities Commission, applicable to like business throughout Company's California system.

All of the energy delivered to Navy is generated in Mono and Inyo Counties, California, and is strictly California intrastate energy unless the Navy's transmission into its Naval Ammunition Depot renders it interstate.

Varying amounts of such energy, averaging about 25% of that sold by Company to Navy at Mill Creek, California, is, after transmission by Navy to the Ammunition Depot, used for the service of employees and others living or doing business on the Depot premises, which use has always been construed by Company to be "for the use of Ammunition Depot," since these employees would not be there or be served otherwise than in connection with the operations of the Depot. Navy never claimed otherwise until this case arose. The rest of the energy sold by Company to Navy, averaging about 75%, is used for the operation of machinery and other mechanical purposes.

I.

The Petition Herein Displays No Actionable Injury to Petitioner by Either the California Public Utilities Commission or by the California Supreme Court.

In its decision, the California Commission declared [R. p. 12]:

> "* * * electric rates prescribed by our Commission are *not* the rates which a utility must charge an arm of the United States Government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that an electric utility may furnish electric service 'at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments.'"

This is emphasized in the Order [R. p. 19] at the close of the Opinion where it is ordered that the Company is *authorized* to charge and collect the rates set forth in Schedule P-2, but as to another customer, Mineral County Power System, the Company was *authorized and directed* to collect the rates set forth in Schedule P-3.

Therefore, said decision and Order of the California Commission fixed only a ceiling on the rates which the Company might charge to Navy but permitted it to charge a lower rate or even to render service free. Hence, there was no injury to Navy and no burden on commerce and nothing for this Court to adjudicate.

Whether the California Commission had or had not jurisdiction is inconsequential, for the result is the same in either case. That Commission's decision left the Navy completely free to negotiate as low a rate as it could, and purported merely to bind the Company not to go above the

P-2 rate. Assuredly, that could not injure the Navy in any way, for if that maximum be removed, the the Navy would not be benefited.

II.

The Sale by Company to Navy Is Not a Sale in Interstate Commerce.

All of the electric energy involved herein is, so far as generation and transmission by Company are concerned, strictly California intrastate energy. It is delivered to Navy at Mill Creek, California, and does not become interstate energy unless the transmission by Navy from California into the Ammunition Depot in Mineral County, Nevada, makes it interstate commerce.

The Navy is a part of the defense and war establishment of the United States authorized by Clause 1 of Section 8 of Article I of the Constitution, giving Congress power "to provide for the common defense," and by Clause 13 of the same Section, giving Congress power specifically "to provide and maintain a Navy."

The idea that the United States or its armed forces in defending or preparing to defend the country are engaged in interstate commerce is novel and incongruous. It would mean that the Navy, in dispatching a battleship from New York to San Francisco would be engaged in interstate commerce. If it sent such battleship to Korea, presumably, it would be engaged in foreign commerce.

Congress does not create and maintain a Navy under its power to regulate interstate and foreign commerce but under the other constitutional powers above mentioned. The United States, in the exercise of its constitutional functions, operates in the country as a whole, entirely

obvious of state lines. The armed forces do not defend the country, state by state, but as an entire nation.

If that were not so, it could just as plausibly be said that the Judicial Department is engaged in interstate commerce, because this Court publishes its decision and sends them throughout the country or because the Justices of this Court or Judges of the lower courts cross state lines in the performance of their judicial duties.

As stated in *The Trade Mark* cases, 100 U. S. 82, "Commerce among the States means commerce between individual citizens of different states" And in *Wabash Co. v. Illinois*, 118 U. S. 557, "Interstate commerce is trading and trafficking in commodities between and amongst citizens of different states."

The Constitution nowhere gives the federal government power to engage in interstate commerce, nor has it ever been supposed that any was needed. Its delegated powers are nation wide; not from state to state. The power was given to regulate interstate commerce, not to engage in it.

So unusual is the idea that the United States in the conduct of its Constitutional functions is engaged in interstate commerce, that there is almost no authority directly on the proposition.

In *Georgia Power Co. v. T.V.A.*, 14 Fed. Supp. 673, it was suggested that T.V.A. was engaged in interstate commerce, but the District Court said:

> "There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The federal power over interstate commerce is to regulate it, not to engage in it. TVA gets no help from that source. Its activities in

> selling electric power as pointed out in Ashwander *et al*, v. Tennessee Valley Authority, 56 S. Ct. 466, 80 L. Ed. ..... rest on the constitutional right of the United States to dispose of their property."

Petitioner presumably claims that the Navy is engaged in interstate commerce because Section 201(c) of Federal Power Act provides:

> "For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States."

But Statutes are not deemed to include the United States unless expressly so indicated.[2]

Moreover, Section 201(f) of the Act provides:

> "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing * * *."

If the Navy is not constitutionally engaged in interstate or foreign commerce, but is merely carrying out a national constitutional function, its transactions cannot be made into interstate or foreign commerce by Act of Congress for the purpose of regulating those who sell commodities to the Navy for use in another state or in a foreign country. Congress may limit or forego some of its powers under the commerce clause (as it has done in Federal Power Act) but it cannot enlarge its powers of

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[2] *United States v. Wittek*, 337 U. S. 346; *United States v. United Mine Workers*, 330 U. S. 258; *United States v. Cooper Corp.*, 312 U. S. 600.

regulation by defining as interstate or foreign commerce that which is not such under the Constitution.

When the Company delivers purely intrastate power to the Navy at Mill Creek, California, that energy becomes part of the defense establishment and nothing that the Navy does with it for defense purposes can be transformed into interstate or foreign commerce.

III.

Neither the Attorney General nor the Solicitor General Has Any Authority to Represent the Government for the Purpose of Surrendering the Navy's Contracting Autonomy to Federal Power Commission.

The Navy is a Constitutional Department of the government with complete power to contract for its supplies, subject only to appropriations or other limitations placed upon it by Act of Congress.

Federal Power Commission is an independent establishment, with authority, among other things, to fix rates for the sale of electric energy for resale in interstate commerce. It fixes the exact rate which is both maximum and minimum and in which no change can be made without its authority.[3]

The effect of the contentions of the Attorney General and of the Solicitor General[4] would be to surrender the contracting power of the Navy Department in relation to the electric energy involved in this case into the hands of Federal Power Commission.

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[3]Sections 205 and 206 of the Act.

[4]The Acting Assistant Attorney General represented the government in the Supreme Court of California [R. p. 5]. The Solicitor General represents the Petitioner in this Court.

is nothing in either case explaining what would be the consequences in the absence of the critical finding that the State Commissions were unable to agree. There we would have power to regulate conferred on both state and federal commissions, precipitating an incongruous condition.

Neither of the two decisions last mentioned makes any disposition of this apparent conflict. In *Safe Harbor Water Power Co.* (*supra*), the Third Circuit definitely held that Part II did not repeal Sections 19 or 20 of Part I, and in *Pennsylvania Water & Power Co.* (*supra*), this Court did not discuss the point, except to say (72 S. Ct. pp. 845-846):

> "It may be possible that some future case will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

Evidently, this Court intended to limit its decision to the facts of that case and not to decide other facts by dictum.

In first *Safe Harbor*, 124 F. 2d 800 (C. A. 3), it was held that, where interstate wholesale rates of a licensee were involved and there was no evidence that the State Commissions wre unable to agree, Federal Power Commission had no jurisdiction. This seems to be supported by *Alabama Power Company*, 128 F. 2d 280, and *Niagara Falls Power Co.*, 137 F. 2d 787.

Following the decision in first *Safe Harbor*, a change in facts occurred in that Public Service Commission of

Maryland on August 30, 1944, addressed a letter to Federal Power Commission asking it to conduct an investigation of the interstate rates between Pennsylvania and Maryland, which letter formed the basis for the finding in both cases relied upon by Petition (*Second Safe Harbor* and *Pennsylvania W. & P. Co.*) that the two State Commissions were unable to agree, thereby vesting jurisdiction in Federal Power Commission under Section 20.

The writ should be denied.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for California Electric Power Company.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A. D. 1952.

9-9-52—80

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,
vs.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

EVERETT C. McKEAGE,
BORIS H. LAKUSTA,
514 State Building, San Francisco 2, California,
Counsel for Public Utilities Commission of the State of California.

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In the Supreme Court
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October Term, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,
vs.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (R. 6-19) is reported at 50 Cal. P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is noted in 38 A.C. 323 (R. 68) and its order denying rehearing is noted in 38 A.C. 484 (R. 74). Neither of such orders is accompanied by an opinion.

the effect of the California Commission's construction is to impute to Congress an intent to deny to the Federal Government the federal protection which it has provided for non-governmental purchasers. To put it another way, the Government argues that since the Federal Power Act was enacted to protect the public, therefore, it was enacted to protect somebody else, viz., the Navy, municipalities, and public utility distribution companies in general. Congress would no doubt be amazed to learn that it enacted the Federal Power Act to protect these several intermediate interests.

The legislative history leaves no mistake that Congress was not at all concerned with protecting public utility distribution companies or any other class of intermediate organization, governmental or otherwise, and that the *ultimate consumer* was its only concern. See *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). Congress was dealing specifically with the gap revealed in the *Attleboro* case (*Public Utilities Commission v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)), where one utility sells in interstate commerce to another utility for resale, and where the resale price to the consumer is affected by the wholesale price. In the instant proceeding not only is the Navy not a public utility, but it does not engage in anything comparable to public utility service by providing, for its tenants at sufferance, electricity at a nominal charge not designed to return the cost plus a profit.

It is submitted that the broad language lifted out of context by the Government from the *Wisconsin-Michigan* case for the purpose of arguing that *all* sales

for resale, even where the reseller is the Navy and even where the ultimate consumers are only tenants, should not be thus misused to extend to a case having different basic facts. In short, it is submitted that the *Wisconsin-Michigan* case does not constitute a decision contrary, even on principle, to the two grounds in the California Commission decision which the Government contends are affected, viz., (1) the holding that the Navy is not a "person" within the definition of "sale of electric energy to any person for resale" (see Petition, 13 *et seq.*), and (2) the holding that sales to tenants are not sales for resale (see Petition, 18).

The *Wisconsin-Michigan* case is currently the subject of two petitions for writs of certiorari filed in this Court, Nos. 291 and 294, this term.

b. The Penn Water case.

In *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952), this Court dealt with the contention that Penn Water, as a type of "public utility" subject to regulation under Part II, was nevertheless not subject to regulation thereunder because it was a licensee subject to regulation under Part I. This Court rejected the contention, saying (343 U.S. at 418):

> "It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one. We hold that Penn Water is subject to regulation under Part

> II of the Act. It is also subject to Part I regulation since the Commission found on substantial evidence, as the court below held, that the States were 'unable to agree' within the meaning of Section 20 of Part I of the Act."

The Government argues that this holding rejects as unsound one of the principal grounds on which the California Commission claimed jurisdiction (Petition, 11, 20). The Government develops its proposition, (1), by seriously misstating the California Commission's ground, (2) by correctly stating that such misstated ground has been rejected in the *Penn Water* case, (3) by going on to attribute a further holding in the *Penn Water* case which a search of that case fails to reveal but which would, indeed, if it could be found, refute the actual ground of the California Commission. Needless to say, the Government's argument on this head is hardly deserving of respect.

Specifically the Government (Petition, 20) declares: "The third ground [of the California Commission], that *an interstate wholesale sale of energy generated at a hydro-electric project licensed under Part I is exempt from regulation under Part II* (R. 15-16), has already been rejected by this Court in *Pennsylvania Water & Power Co. v. Federal Power Commission* . . ." (Emphasis added.) It is true that the *Penn Water* case rejects the ground as stated, but certainly it is not a ground employed by the California Commission. The California Commission was at pains to point out that its conclusion was arrived at independently of whether Part I and Part II of the Act both applied, or Part I only applied or

Part II only applied (R. 12). It was not necessary to decide that issue because, regardless of how it might be decided, Federal Power Commission jurisdiction was found not to exist. Furthermore, the ground which the Government does refer to assumes that both Parts I and II apply.

What the California Commission's actual ground was (R. 15, 16) is spelled out in the following paragraph, and we reiterate that it assumes both Parts I and II of the Act apply, to the extent of making necessary an inquiry whether their provisions grant or deny jurisdiction to the Federal Power Commission.

The California Commission concluded that if there were no federal statute at all, the sales to the Navy could be regulated by the California Commission without violating the interstate commerce clause proscription as revealed in the *Attleboro* decision because, since Nevada could have no jurisdiction over the Navy or the rates it might charge its customers, there would be *no potential clash of state interests* of the kind present in the *Attleboro* case. The California Commission next concluded that even if it were wrong in such interpretation of the interstate commerce clause, if Part I alone of the Act were assumed to exist, the machinery set up by Congress in Section 20 to enable states under certain conditions to exercise jurisdiction without burdening interstate commerce would be available upon the facts shown and make it possible for California to regulate the sales to the Navy. The California Commission next took the situation as it existed, viz., with both Parts I and II enacted by Congress, and concluded that since state jurisdiction

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The over-all question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, grant to California Electric Power Company permissive authority to charge certain rates in selling electricity to the Navy in California, the Navy taking delivery in California and transmitting the energy over its own lines to Nevada for the use of its Ammunition Depot in that state.

The subsidiary questions are:

(1) Does Part I of the Federal Power Act, giving the Federal Power Commission jurisdiction over sales of electric energy by licensees only in the exceptional circumstances set forth in Sections 19 and 20, give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the California Commission is admittedly a qualified commission and where Nevada, whether it has a qualified commission or not, could not in any event regulate the arrangements the Navy makes with its tenants for furnishing electricity because the Navy is an arm of the United States? Section 19 would apply if the sales to the Navy are in *intra*state commerce and local jurisdiction would be conceded. Section 20 would apply if the sales are in *inter*state commerce, and it would then be necessary to make further inquiry to determine (a) whether

both California and Nevada are states "directly concerned," and if so, (b) whether Nevada as well as California has a regulatory commission of the kind contemplated in Section 20, and also if so, (c) whether California and Nevada have been shown unable to agree.

(2) Does Part II of the Federal Power Act, giving the Federal Power Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce but . . . not . . . any other sale" (Sec. 201(b)), give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the purchaser is not a public utility but the United States Navy, and where the energy is purchased solely for use of the Navy's Ammunition Depot in Nevada? The answer depends upon (a) the nature of the sales as being in interstate commerce or not; (b) the definition of "person" in Section 3(4) and the application thereof to the facts in construing Section 201(d) of the Act; (c) the nature of the sales as "wholesale" or not under the definition in Section 201(d) of the Act; (d) the applicability of Section 201(f) exempting the United States from the provisions of Part II; (e) the applicability of Sections 201(a) and 201(b) which preserve state jurisdiction if it existed before.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act which it is understood was submitted with the petition.

STATEMENT.

Petitioner's Statement (Petition, pages 5-10) is accurate. A jurisdictional dispute exists between the California Public Utilities Commission and the Federal Power Commission over the regulation of rates for sales of electric energy by California Electric Power Company to the Navy. The California Commission's position has been sustained by the California Supreme Court, whose action in denying a writ of review constitutes a determination upon the merits.[1] The Federal Power Commission's order (reversing the examiner's proposed opinion) has been subjected to review before the United States Court of Appeals for the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act. *California Electric Power Company v. Federal Power Commission*, C.A. 9, No. 12987. Oral argument was had on August 4, 1952. No decision has been rendered to date.

The Federal Power Commission is not a party to the present proceeding. The United States is petitioner, not in the stead of its agency the Federal Power Commission but in the stead of its naval organization, the Navy Department (R. 3). The Navy's position is that the sales to it by California Electric Power Company are subject

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[1] Public Utilities Code (Cal. Stats. 1951, ch. 764), Section 1757. *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 747 (1936); *People v. Hadley*, 66 Cal. App. 370, 375 (1924). In *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920), this Court recognized that under the California statute the denial of a writ of review by the California Supreme Court respecting an order of the Public Utilities Commission (formerly Railroad Commission) is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California" (251 U.S. at 372).

to Federal Power Commission jurisdiction, not California Commission jurisdiction. The Navy went so far as to adopt, as its points and authorities in seeking California Supreme Court review, the opinion of the Federal Power Commission in the cognate show-cause-proceeding (R. 23, 24), an opinion which for the time being means lower rates to the Navy than those authorized by the California Commission. Such latter circumstance would suggest the motivation for the Navy's position.

Since the energy which California Electric Power Company sells to the Navy is derived in part from federal water power projects of which the company is licensee, and since the energy crosses the state line into Nevada where the Navy as purchaser uses it not only for its industrial operations but for its tenants, both Part I of the Federal Power Act (applying to sales by licensees) and Part II of the Act (applying to sales at wholesale in interstate commerce) are involved in considering the question of jurisdiction.

ARGUMENT.

While admittedly this case raises questions under the Federal Power Act respecting the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy, it is believed this Court will desire to weigh the following circumstances in determining whether a writ of certiorari should issue:

1. THE OVER-ALL QUESTION IS PECULIARLY NARROW.

The fact that the Navy is the purchaser is a controlling factor in determining the jurisdictional question. Accordingly, whatever the decision, the case can have no general applicability. Nearly all large purchases of electricity for consumption in another state are made by public utility distribution companies, not by the Navy or some other branch of the Federal Government: And even as to the Federal Government the instances must be rare indeed where some branch thereof purchases electric energy in one state, transports it to another, and applies the energy in part to federal industrial activities, while supplying the balance to its tenants. It may even be questioned whether any agency of the Federal Government except the Department of Defense and its divisions could be involved in similar factual circumstances.

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2. THE CASE HAS SIGNIFICANCE ONLY WHEN RELATED TO ITS PECULIAR FACTS.

Under Part I of the Federal Power Act, state jurisdiction over sales by licensees is vouchsafed even where the sales are in interstate commerce, provided (a) the states "directly concerned" (b) have adequate regulatory bodies and (c) the states have not been shown unable to agree on the rates to be charged. These are largely factual determinations. Accordingly any case involving them can have significance only as limited by those facts. Such circumstance may have had impelling influence in this Court's refusal to issue a writ of certiorari in

the First and Second Safe Harbor cases. The present case seems even stronger for declining review because the determination of which states are "directly concerned" hinges upon the unusual circumstance that the Navy is the purchaser, a department of the Federal Government falling outside the regulatory competence of any state.

Not only under Part I but under Part II the peculiar facts render the case of limited significance. The sales for ultimate consumption are to *tenants of the Navy*, not to the general public. The determination whether such sales are "sales to a person for resale" can have only limited importance beyond the immediate case.

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3. THE CALIFORNIA COMMISSION'S DECISION DID NOT DEPEND UPON ANY FINDING THAT THE SALES ARE IN INTRASTATE COMMERCE.

It is believed that a strong argument may be made for the proposition that the sales are not in interstate but intrastate commerce since the purchaser which transports the energy across a state line is the Navy, an arm of the Federal Government, not touched by the concept of interstate commerce.[3] However, the California Com-

[2] *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F. 2d 800 (3d Cir. 1941), cert. denied, 316 U.S. 663 (1942); *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179 (3d Cir. 1950), cert. denied, 339 U.S. 957 (1951).

[3] The Government states (Petition, page 11, Footnote 5) that the authorities leave no doubt that the sales are in interstate commerce. However, none of the cases cited relates to sales of the nature here in issue where the purchaser is the Federal Government.

mission came to its conclusion independently of the interstate commerce question. In construing the Federal Power Act it assumed, for purposes of argument at each juncture in the development of the decision, that interstate sales were involved. Thus there is eliminated any concern which this Court might entertain, at this stage of the proceeding, as to the correctness of any determination below respecting the interstate or intrastate nature of the sales.

4. THE GOVERNMENT (NAVY) HAS NOT BEEN HARMED BY THE CALIFORNIA COMMISSION'S ORDER WHICH IS PERMISSIVE ONLY.

Since the order in question merely authorizes and does not direct California Electric Power Company to charge certain rates in selling to the Navy (R. 19), the company is no precluded from charging any lesser rates since by virtue of the California Commission's General Order No. 96, electric utilities may furnish electric service "at free or reduced rates . . . to the United States and to its departments" (R. 12). The effect of the decision is to place a ceiling but not a floor upon the rates the company may charge. There is nothing in the decision to preclude the company from applying the old 1943 contract rate which the Federal Power Commission in its Opinion No. 212 (R. 24) ordered the company to put in effect pending rate relief under federal regulation (R. 40).

It should be noted that the Court of Appeals for the Ninth Circuit issued an order staying the Federal Power Commission order (R. 72, 73).

It would appear that at most the effect of the California Commission's decision has been to deprive the Navy of some quantum of intangible bargaining power it may have had in negotiating a price for electricity purchased from California Electric Power Company.

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5. THE CALIFORNIA COMMISSION'S DECISION, WHICH RESTS UPON A NUMBER OF PRINCIPAL GROUNDS, ANY ONE OF WHICH IS SUFFICIENT TO SUSTAIN ITS CONCLUSION, IS NOT INCONSISTENT WITH EXISTING COURT DECISIONS.

The burden of the United States' petition is that the California Commission's decision runs contrary in principle, in so far as certain aspects of the case are concerned, to the ruling of the Seventh Circuit in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952) and contrary, in so far as certain other aspects of the case are concerned, to the decision of this Court in *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952).

We do not believe that the *Wisconsin-Michigan* case is contrary to any of the grounds in the California Commission's decision, even in principle. As to the *Pennsylvania Water* case we believe that that decision, far from being contrary to the position of the California Commission, in fact supports it.

Below are set forth the reasons why we believe that neither of the decisions referred to affects the correctness of the California Commission's conclusion. It must

be emphasized that any *one* of the principal grounds relied on by the California Commission is sufficient to sustain its position.

a. The Wisconsin-Michigan case.

So far as here pertinent the Seventh Circuit held in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952), petitions for certiorari filed (*Wisconsin-Michigan Power Co. v. Federal Power Commission*, No. 291, Oct. Term, 1952; *Wisconsin v. Federal Power Commission*, No. 294, Oct. Term, 1952), that sales in interstate commerce of electric energy by a public utility to a *municipality* for resale by the latter fall within the purview of the term "sale of electric energy at wholesale" (Section 201(b)), that is, "sale of electric energy to any person for resale" (Section 201(d)), notwithstanding the fact that municipalities are expressly excluded from the definition of "person" in Section 3(4).

The Court recognized that its conclusion was contrary to the literal meaning of the statute (197 F. 2d at 479) but was persuaded by Government counsel to reject the literal meaning as an "oversight," an inadvertent "slip" on the part of Congress.

It would not be appropriate here to unmask in detail the numerous invalid hypotheses which the Government pressed upon the Seventh Circuit and is now pressing upon this Court in urging that Congress did not know what it was doing in defining sales at wholesale. An illustration will suffice. The Government urges that the

House in broadening the definition of "wholesale sale" in the Senate bill (S. 2796, 74th Cong., 1st Sess.) to overcome an obvious loophole in an aspect not here relevant, and in using the phrase "sale of electric energy to any person for resale" to accomplish that result, was concentrating so much upon closing the loophole that it quite forgot that the word "person" was elsewhere specifically defined to exclude municipalities and also to exclude the United States (Petition, 14, 15). The Government urges that if Congress had been more articulate, it would have expressly said that "person" as used in the phrase "sale . . . to any person for resale" meant something else than in the section defining "person." The Court is asked to impute to a word a meaning which is diametrically contrary to the express definition thereof in the same statute. The Court is asked to cast aside the principle of statutory construction that the plain meaning of a statute must be accepted in the absence of manifest error and to substitute in its stead a presumption of careless draftsmanship.

The Government, after discoursing in similar fashion on other aspects of the legislative history, embarks upon an "unreasonable result" argument (Petition, 17) designed to demonstrate that unfortunate consequences would ensue were not municipalities and the Government included by implication in the term "person." In one breath it is stated, quite properly, that Congress established the Federal Power Commission to regulate interstate sales for resale in order to protect the *public* from exploitation by public utilities. In the next breath it is argued, by some transitional process not revealed, that

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IN THE

Supreme Court of the United States

October Term, 1952
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

Statement of the Case.

The ultimate question involved in this case is whether Federal Power Commission (FPC) or California Public Utilities Commission (California Commission) with or without concurrence of Nevada Public Service Commission (Nevada Commission) has authority to regulate rates charged by Respondent, California Electric Power Company (Power Company or Company), for electric energy delivered and sold at its Mill Creek Plant in Mono County, California, to the United States Navy (Navy) which transmits such energy over its own transmission line for use at Navy's Ammunition Depot, Hawthorne, Nevada.

Subsidiary to the main question, is the question whether, if FPC has jurisdiction over some of such sales, it extends to more than a minor part of such energy which is claimed to be resold.

Company's Electric System.

Power Company renders public utility electric service in Southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside, and Imperial Counties, and, to a much less extent, in Nye and Esmeralda Counties, Nevada [R. 7]. Its system extends in a fairly straight line about 300 miles from Bridgeport, the County Seat of Mono County, California, to San Bernardino, California, from which it widens out into general areas of San Bernardino and Riverside Counties, California, where its largest service areas are located.

Power Company is subject to the jurisdiction of California Commission pursuant to Public Utilities Act of said State (Calif. Stat. 1915, p. 115, as amended; Deering Gen. L., Act 6386).

Power Company is also subject to the jurisdiction of Nevada Public Service Commission by reason of business done in Nye and Esmeralda Counties, Nevada, pursuant to the Public Service Commission of said State (Nev. Stat. 1919, p. 198; Nev. Comp. L. 1929, Secs. 6100 *et seq.*). Said Company is not, however, engaged in business in Mineral County, Nevada, and owns no facilities therein, its service in Nye and Esmeralda Counties being entirely distinct from its sale to Navy at Mill Creek, California, for Navy's use in Mineral County, Nevada.

was allowed prior to the enactment of Part II, whether under the Constitution or by virtue of Part I, Part II by its own terms in Sections 201(a) and 201 (b) operated to deny Federal Power Commission jurisdiction since those sections expressly reserved to the states whatever jurisdiction they possessed prior to the enactment of Part II.

We find nothing in the *Penn Water* case to invalidate the ground of the California Commission as thus stated. It must be remembered that the *Penn Water* case did not involve facts making the *Attleboro* principle inapplicable and did not involve facts showing an absence of disagreement between two states. In short, we submit that the Government's contention that the *Penn Water* case is contrary to a principal ground of the California Commission in construing Sections 201(a) and 201(b) of Part II is unwarranted.

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6. THE CALIFORNIA COMMISSION'S CONCLUSIONS UNDER PART I ARE DEMONSTRABLY CORRECT. THE GOVERNMENT CITES NO AUTHORITIES IN CONFLICT.

This aspect of the Government's argument for a writ deserves summary disposition.

First it is argued (Petition, 21-23) that the California Commission could not properly conclude that Nevada was a state not "directly concerned" under Section 20. The Government agrees that Nevada has no jurisdiction over the Navy, either as to the rates the Navy pays California Electric Power Company or as to the rates the Navy charges its tenants. It then declares that "intergovern-

Licenses.

Power Company is a licensee [R. 1] under Part I of Federal Power Act (Act) (16 U. S. Code, Secs. 791 *et seq.*), holding licenses for five hydroelectric projects covering nine plants, seven of which are on the Northern Division of Power Company's system and involved in service to Navy as follows:

Mono County, California

	Capacity
Project 1390 Mill Creek Plant	2,500 kw
" 1388 Poole Plant	9,600 "
" 1389 Rush Creek Plant	10,500 "
	22,600 kw

Inyo County, California

Project 1394 Bishop Creek Plant 2	6,000 kw
" " " " " 3	7,200 "
" " " " " 4	6,000 "
" " " " " 5	3,500 "
(Non Project) " " 6	2,100 "
	24,800 kw

From Mill Creek Plant, a 55 kv (kilovolt) line extends to Leevining Substation, into which feeds the Poole Plant on Leevining Creek. From Leevining Substation, a 100 kv tie line known as Northern Division Tie Line extends through and past Rush Creek Plant, thence to the Bishop Creek Plants a distance of some 60 miles.

mental immunity operates with an even hand on both California and Nevada, and, consequently, as far as that Section [20] is concerned, the states' authority to regulate, if they have any, is equal." The Government quite misses the point. California does not claim jurisdiction over the Navy any more than Nevada would. California's basis for jurisdiction is its general regulatory authority over California Electric Power Company. California *is* directly concerned because of that regulatory control. Nevada has no corresponding basis for jurisdiction and is, therefore, not a state "directly concerned."

Next the Government argues that, assuming Nevada is a state "directly concerned," it has not the sort of regulatory commission contemplated by Section 20. The contention is that the Nevada Public Service Commission, to qualify, would have to have (1) extraterritorial powers over utilities operating in other states (Petition, 24), (2) jurisdiction over sales for resale in another state—presumably even where the purchaser is the Navy (Petition, 24), and finally (3) authority to participate in fixing a joint rate with another state (Petition, 25). No authority is cited for the imposition of such requirements and certainly Section 20 was not intended to impose them. The Government in effect argues that a commission to qualify under Section 20 must have powers encroaching upon the sovereignty of a sister state. Such was not the intent of Congress.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
September 15, 1952.

Respectfully submitted,

EVERETT C. MCKEAGE,

BORIS H. LAKUSTA,

Counsel for Public Utilities Commission of the State of California.

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HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for Respondent, California Electric Power Company.

H. M. HAMMACK,
KENNETH M. LEMON,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

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ARGUMENT.

I.

This Case Presents No Justiciable Controversy, for, Even if California Commission Had No Jurisdiction to Issue Decision 45913, Navy Was Not Harmed Thereby, nor Would the Reversal of That Decision Benefit Navy in Any Way.

The opposite would be true if other than a governmental agency were the consumer, for then the rate fixed by California Commission would be the rate and the only rate, maximum and minimum, which Power Company could charge. But, as stated by California Commission in Decision 45913 [R. 12]:

> "* * *. electric rates prescribed by our Commission are not the rates which a utility must charge an arm of the United States Government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that an electric utility may furnish electric service 'at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments.' (See Public Utilities Act, Section 17.)"

This principle is observed in the Order [R. 19] where it is ordered that, as to Navy, the Company is *authorized* to charge and collect the rates set forth in Schedule P-2, but as to another customer, Mineral County Power System, the Company is *authorized and directed* to charge and collect the rates set forth in Schedule P-3.

Hence, the Order is permissive only and does no more than provide a ceiling above which Power Company cannot go. Obviously, what Navy objects to is, not that California Commission fixed a ceiling, but that *it raised the ceiling formerly existing.* Undoubtedly Navy would not object if the California Commission should *restore the old and lower ceiling rate.* So it is really not objecting to the jurisdiction of the California Commission, but to the way the jurisdiction was exercised. The reversal of Decision 45913, without more, would only remove the ceiling rate and not benefit Navy in any way. Decision 45913 left Navy completely free to negotiate as low a rate as it could and purported to limit only the Company. Decision 45913 placed no burden on commerce, and had no effect upon Navy. The objection now raised by Navy seems to be aroused by, and directed solely at the opinion of the California Commission expressed in Decision 45913 to the effect that it had jurisdiction over Power Company's rates to Navy. But even though the expression of this opinion might be distasteful to Navy, it has not affected Navy's rights in any way and is not a matter for legal relief.

II.

Neither the Attorney General, Solicitor General, Navy Department, nor Counsel Therefor Have Any Authority to Maintain This Action or Review for the Purpose or Effect of Transferring the Negotiating and Contracting Powers of the Navy Department in the Procurement of Electric Power to the Rate Fixing Jurisdiction of FPC, an Independent Establishment.

At present Navy has complete and unrestricted power to negotiate with Power Company or anyone else for any electric energy which it may wish to purchase at the best price obtainable, which, as to Company, may be any rate at or below the P-2 Schedule authorized by California Commission, the rate orders of said Commission fixing only a maximum for the rate charged governmental agencies [R. 12]. Whether or not that is a desirable or advantageous or economic position or method, is not for the Navy Department or the Department of Justice to decide, for it is the situation which has been provided by Congress.

There is no authority for any of the moving parties in this proceeding to maintain it for the purpose of surrendering any portion of the Navy Department's autonomy into the hands of FPC, which is an agency never contemplated by Congress as having control of the Navy's contracting for supplies of any kind. Any rate fixed by FPC would, under the provisions of Section 205, be both the maximum and minimum, for, under paragraph (c) of that section, no discrimination by deviation therefrom would be allowed. Thus, Navy would have completely surrendered to FPC its power to conduct and control that

part of its affairs, without the knowledge or consent of Congress.

It may assist in appreciating the importance of this point to ask the question: Why does Navy so diligently prosecute this litigation for the general end and purpose that jurisdiction to fix the rate at which Navy purchases energy shall be vested in FPC? It certainly cannot be mere academic interest in pursuing some ideal about rate regulation. There must be some purpose of more pecuniary character or more directly related to Navy's affairs. Is it the expectation or hope that FPC will fix a lower rate than the ceiling rate named by California Commission and is that anticipated for only the immediate present or is it supposed to be a permanent condition? If some assurance existed that one regulatory agency will always be lower or higher than another in fixing a rate, one or the other must proceed on a prejudiced, arbitrary, non-judicial, and false basis, for a just, fair, reasonable, non-discriminatory rate ought to be approximately the same in the language of any regulatory commission and it ought not to be affected by the favoritism of a Federal commission for a Federal consumer or of a State commission for a State consumer.

While FPC and its counsel might be here simply and only to protect what they regard as FPC jurisdiction, the interest of the Department of the Navy and the Department of Justice must be fired by some different motive. But there is no statutory authority for their efforts to surrender the contracting autonomy of the Navy Department to FPC, and, if they succeed, yet are disappointed in procuring lower rates at the hands of FPC, will Navy not then want to retract?

III.

History and Analysis of Federal Water Power Act, Also Called Federal Power Act.

Introductory to the presentation of our Points IV and V intended to show that Power Company's deliveries to Navy are, under the facts of this case, subject to regulation solely by State Commission or Commissions and that, independently of that ground, Company's deliveries to Navy are not subject to regulation by FPC under Part II of the Act, it seems necessary first to call attention briefly to some of the background and history of the present legislation on which this case turns.

The Act with which we have to do was not, as some seem to suppose, a new Act of 1935, to which the old Federal Water Power Act of 1920 was prefixed as Part I and as a historical relic or subordinate part to be overshadowed by Parts II and III. On the contrary, what is called *Federal Power Act* is the *Federal Water Power Act,* approved June 10, 1920 (41 Stat. 1063), as amended and extended in 1935. Not only is this demonstrated by the language of the enactment of 1935, but the whole act is still classified for codification under the division of the U. S. Code (Title 16) devoted to "Conservation," and not under "Commerce" (Title 15) as is the Natural Gas Act, which corresponds to Part II of the Water Power Act.

The *Public Utility Act,* approved August 26, 1935 (49 Stat. 838) provided in part:

> "Sec. 212. Sections 1 to 29, inclusive, of the *Federal Water Power Act,* as amended, shall constitute Part I of *that* act, and Sections 25 and 30 of such Act, as amended, are repealed; Provided, That nothing in *that* Act, as amended shall be construed to re-

peal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1931 (41 Stat. 1353) or the provisions of any other Act relating to national parks and national monuments.

"Sec. 213. *The Federal Water Power Act,* as amended, is further *amended by adding thereto the following parts:*" (Emphasis supplied.)

(Then follow Parts II and III.)

So, what is called *Federal Power Act* is technically and in reality the *Federal Water Power Act of 1920,* amended in some particulars in the former text and further amended by adding thereto Parts II and III. The name "Federal Power Act" is merely a short title authorized by Section 320, the final Section of the Federal Water Power Act.

(a) Right of Way Acts.

Part I of the Act is essentially the same (with amendments not material in this case) as the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), which in turn emerged out of prior practices in the Departments of Interior and Agriculture under the Right of Way Act of February 15, 1901 (31 Stat. 790). That Act authorized the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations for electrical plants, poles, and lines and for the generation and distribution of electrical power and other purposes, provided, that such permission might be revoked by the Secretary or his successor at any time and should not be deemed to confer any right or easement or interest in, to, or over any public land, reservation or park.

For twenty years, the Act of 1901 relating to both plants and lines, supplemented by the Act of March 4, 1911 (36 Stat. 1253), relating only to lines, afforded the only means of access to the public lands for electrical developments.

The conservation movement, which had begun earlier and which had succeeded in the establishment of the National Forest Reserves (Act, March 3, 1891; 26 Stat. 1095, 1101-1103, Sec. 24), assumed increased vigor and procured the transfer of the Forest Reserves to the jurisdiction of the Secretary of Agriculture (Act, Feb. 1, 1905; 33 Stat. 628) and later the creation of the Forest Service in that Department (Act March 4, 1911, 36 Stat. 1244). Therefore, after Feb. 1, 1905, all power permits and lines in the National Forests were issued by the Secretary of Agrictulture, and those affecting other public lands, by the Secretary of the Interior.

(b) Departmental Regulations.

Under the power given by all these acts to the Secretaries to issue general regulations for their administration, both Secretaries did so, those issued by the different departments being similar but not identical.

Under the Act of Feb. 15, 1901, the Secretary of the Interior, in 1912 and 1913, promulgated regulations requiring various provisions and undertakings by the Applicant for a power permit. These included a stipulation to pay an annual rental charge based on horsepower per year, to allow inspection of books and records, to maintain an accounting system approved by the Secretary, *to conform to the regulation of rates by State authorities*, to allow recapture of the project by the government, and other conditions all suggestive of later legislation and

From and by means of said 55 kv line between Mill Creek and Leevining Substation, all of the local customers of Power Company in Mono County are served, directly or indirectly, including the Town of Bridgeport, the Town of Leevining, the Garbutt Mine, the Navy, and Mineral County Power System. Power Company sells and delivers electric energy to the Navy at the Mill Creek plant substation or terminal of said 55 kv line, and the energy is metered in said substation, all the facilities of which are owned by Company, except the oil circuit breakers and disconnect switches which belong to Navy [R. 2].

Mono County being a sparsely settled, remote, mountainous area, the entire electric load therein, including energy sold to the Navy and to Mineral County Power System for use in Nevada, amounts to only 3,050 kw (kilowatts) and so is normally carried by one or more of the Mono County Plants of a total 22,600 kw capacity. At times, however, said plants are restricted in generation so that some power flows north out of the Bishop Creek Plants and, formerly, in part, from a plant of the City of Los Angeles on the Owens River pursuant to a contract subsequently terminated.

From Bishop Creek, energy in excess of the comparatively small amount sold in Mono and Inyo Counties, flows south. No energy ever flows from the south into Bishop Creek or into the Northern Division lines, so that only the part of Company's system consisting of plants and lines on and north of Bishop Creek are involved herein.

Contract With Navy.

For some years, the United States, Navy Department, Bureau of Yards and Docks, has maintained and operated, on a Naval Reservation in Mineral County, Nevada, an Ammunition Depot known as "Naval Ammunition Depot, Hawthorne, Nevada," for the storage, packing, shipment, renovation and reworking of explosives, involving various mechanical, technical, and industrial processes and operations simulating a typical industry or factory, and requiring electric energy for motive power, as well as for illumination of the Depot and grounds. Prior to 1943, said power was partly purchased from Mineral County Power System, a publicly owned distributing agency doing business in Mineral County, Nevada, and partly generated by internal combustion engines in Navy's generating station on the Depot Reservation.

During the recent war, in 1943, the increased power requirements of the Depot caused Navy to apply to Power Company for the delivery of energy at Company's Mill Creek Plant, California, into a 55 kv transmission line to be constructed, owned, and operated by Navy from said Mill Creek Plant to the Ammunition Depot in Mineral County, Nevada.

Accordingly, a contract was negotiated for that purpose, and, by reason of certain Presidential Directives, dated September 26 and October 22, 1942, designed to secure economy and fair rates in the purchase of electric energy for the numerous war plants and other installations then being erected by the Government (but having

some of which were adopted into the Federal Water Power Act of 1920. Those Regulations were amended from time to time (see Regulations Aug. 24, 1912, 41 Land Decisions 150, and March 1, 1913, 41 L. D. 532).

Regulation 14(R) of the issue of 1913 is of interest here, as requiring the permittee to stipulate in writing:

> *"To abide by such reasonable regulation of the service to be rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of the prices to be paid therefor as may from time to time be prescribed by the State or any designated agency of the State in which the service is rendered;* Provided: That for the purpose of this paragraph any such regulation shall be deemed to be suspended pending proceedings in the Courts of such State, or in the Supreme Court of the United States on appeal from said State Courts where such proceedings are in the nature of an appeal taken direct from the office. Commission, or board prescribing such regulation to such State Court." (Emphasis supplied.)

In the "Use Book" issued by the Secretary of Agriculture, December 14, 1915, applying particularly to water power, Regulation L-25, page 34, required the permittee to stipulate in writing:

> "To abide by such reasonable regulation of the service rendered and to be rendered by the Grantee, whether in respect to the furnishing or transmitting of power or to the transmitting of communications by telephone or telegraph, and *of rates of payment therefor, as may from time to time be prescribed by the state or by any duly constituted agency of the state in which the service is rendered;* but if such regulation with respect to the furnishing or trans-

no relation to interstate commerce as distinguished from intrastate commerce) FPC, through its representative, Dr. Blalock, participated in the negotiation of the rates to be named in the contract, the matter being numbered W-459 (the "W" apparently standing for "War") in FPC records, and a copy of said contract being retained by FPC in its file W-459. But FPC did not fix or determine or approve or order such rate in the exercise of any jurisdiction under the Federal Power Act, and did not file or require Power Company to file said contract as a rate schedule, nor did the Company ever do so. The contract was not one for the sale of electric energy at wholesale, that is, for resale as defined by Section 201 of the Act, and for that reason, if for no other, was not within the jurisdiction of FPC under the Act.

Said contract between Power Company and Navy was dated July 1, 1943, and provided, among other things, as follows [R. 2, 9, 10-11, 59]:

> "That from and after the first day of July, 1943, *until the end of the fiscal year 1944, and thereafter until sixty (60) days' written notice to the contrary* is given by either party to the other, the Company agrees to furnish to the Government, and the Government agrees to purchase from the Company, all electric energy required by the Government delivered at the Company's Mill Creek (Jordan) Power Plant, located near Lundy Lake, Mono County, California, *for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada*, except such electric energy as may be generated by the Government on such premises * * *." (Emphasis supplied.)

Rate Proceedings Before California Commission.

Within two years after the close of the war in 1945, inflation, with consequent increases in operating costs, necessitated Power Company's application (No. 28791) in October 1947 to California Commission for a general increase of rates throughout the Company's California System [R. 2]. Pursuant to hearings at which Navy was represented, the California Commission, on July 1, 1948, effective August 1, 1948, issued Decision No. 41798 [R. 2, 8] authorizing increases in rates generally throughout Company's California System. Among the schedules of rates fixed by said decision was Schedule P-2 applicable to customers of the same type and kind as the Navy.

Acting in accordance with the mutual option contained in the contract of July 1, 1943, between Power Company and Navy, the Company, as of October 1, 1948, elected to terminate and did terminate said contract by written notice to Navy [R. 2, 9]. There then arose a dispute as to whether said Decision No. 41798 had or had not applied to the Navy contract or to any rate for service to Navy at Mill Creek, California, it appearing that, while said contract had not been expressly mentioned in said decision, it was evident from the evidence and exhibits in said proceeding that all of the calculations of Company's revenues and expenses, made by Company, by the Commission's Staff, and by other interested parties, included revenues and expenses in connection with sales to the Navy, and, particularly, was this true in spreading the

increases in rates among the several classes of consumers on Company's system [R. 8].

In order to settle this dispute, Power Company, on August 8, 1949, filed with California Commission its First Supplemental Application to Application No. 28791, requesting a determination that Schedule P-2 fixed by Decision No. 41798 was applicable to Navy or, if not, that a proper rate for Navy be fixed [R. 2, 6]. A hearing was held on said Supplemental Application October 7, 1949, at which Navy was represented. That hearing was continued to a later date.

Proceedings Before FPC.

Meanwhile, some correspondence between California Commission and FPC resulted in an agreement between the State and Federal Commissions to hold a concurrent hearing on the matter involved in said proceeding before California Commission and on an Order to Show Cause to be issued by FPC. On February 15, 1950, FPC issued and served upon Power Company its Order to Show Cause, which is not in the Record but the nature of which can be judged from the final Order of April 12, 1951 [R. 35-41], since the latter sustained every finding and order proposed by the former.

Following the concurrent hearing, held March 20-21, 1950, that is, before FPC on said Order to Show Cause, and before California Commission on said Supplementary Application in Application No. 28791, the Hearing Examiner for FPC filed his report (initial decision under the Administrative Procedure Act; 5 U. S. C., Sec. 1007) in which he sustained the contentions of Power Company in every respect and recommended the dismissal of the Order to Show Cause.

After considerable delay, FPC, one Commissioner dissenting, on April 13, 1951, issued its Opinion No. 212 and Final Order [R. 24-41], reversing the Hearing Examiner on all points and, among other things, ordering that [R. 41]:

> "(C) California Electric Power Company file the rates and charges as set forth in its agreement introduced in evidence as Exhibit No. 1, dated July 1, 1943, with the United States of America, represented by the Chief of the Bureau of Yards and Docks, Navy Department, as a rate schedule for service to the Navy, such schedule to be effective until and unless schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order.
>
> "(D) California Electric Power Company cease and desist from charging Navy any rate other than that duly filed with the Commission."

The FPC Order went to the Court of Appeals for the 9th Circuit on Certiorari pursuant to Power Company's petition filed June 21, 1951, where all points were decided against the Company October 14, 1952. (*California Electric Power Company, a corporation, Petitioner v. Federal Power Commission, Respondent, County of Mineral, State of Nevada, and United States of America, Intervenors*, No. 12,987, ... F. 2d .....) Petition for Certiorari has been filed in this Court, December 11, 1952.

California Commission's Decision No. 45,913.

On July 3, 1951, California Commission issued Decision No. 45,913 [R. 6]. Petition for Writ of Review was filed by Navy with the Supreme Court of California, August 29, 1951 [R. 1] which was dismissed January

21, 1952 [R. 68], and rehearing denied February 18, 1952 [R. 74].

Certiorari was granted by the Supreme Court October 13, 1952.

Summary of Argument.

I.

THIS CASE PRESENTS NO JUSTICIABLE CONTROVERSY, FOR, EVEN IF CALIFORNIA COMMISSION HAD NO JURISDICTION TO ISSUE DECISION 45913, NAVY WAS NOT HARMED THEREBY, NOR WOULD THE REVERSAL OF THAT DECISION BENEFIT NAVY IN ANY WAY.

II.

NEITHER THE ATTORNEY GENERAL, SOLICITOR GENERAL, NAVY DEPARTMENT, NOR COUNSEL THEREFOR HAVE ANY AUTHORITY TO MAINTAIN THIS PROCEEDING OR REVIEW FOR THE PURPOSE OR EFFECT OF TRANSFERRING THE NEGOTIATING AND CONTRACTING AUTONOMY OF THE NAVY DEPARTMENT IN THE PROCUREMENT OF ELECTRIC POWER INTO THE RATE FIXING JURISDICTION OF FPC, AN INDEPENDENT ESTABLISHMENT.

III.

HISTORY AND ANALYSIS OF FEDERAL WATER POWER ACT, ALSO CALLED FEDERAL POWER ACT.

The Act involved in this case was not a new Act in 1935 to which a prior Act of 1920 was attached as a subordinate part, but the Act here involved *is* the Federal Water Power of Act of 1920, textually amended only in minor details and further amended by the addition of Parts II and III relating to regulation of electric utilities engaged in interstate commerce.

(a) The Right of Way Acts, particularly, the Act of Feb. 15, 1901, and (b) Regulations thereunder issued by the Secretaries of Interior and Agriculture in 1913 and 1915 were superseded and to a large extent perpetuated in theory by (c) Federal Water Power Act of 1920. The policy adopted by the Secretaries as early as 1913 and 1915 of requiring licenses of water power sites on the public domain to conform to regulation of rates by the Commission of the state where the service was rendered and the rate charged, or, if state regulation was not available, then to conform to rate regulation by the Secretary, was substantially adopted into (d) Sections 19 and 20, FPC being substituted for the Secretaries, though the three Secretaries of Interior, Agriculture and War constituted FPC until 1930. Said Act of 1920 became Part I of the present Federal Power Act.

(e) Part II of the Act applies only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale (for resale) in interstate commerce.

(f) Part II did not repeal or displace or qualify Part I, which was enacted under the Public Property clause of the Constitution (Art. IV, Sec. 3, Clause 2) for the purpose of licensing citizens to occupy the public lands for the development of power. Part II was enacted under the Commerce Clause (Art. I, Sec. 8, Clause 3).

(g) Parts I and II are easily reconciled to form a simple and workable method of regulating licensees engaged in interstate commerce as distinguished from non-

licensees engaged in interstate commerce, and, since the decision of this Court in *Idaho Power Company* (*infra*) the two parts must be reconciled, because they are independent and neither qualifies the other.

IV.

SINCE POWER COMPANY IS A LICENSEE UNDER PART I OF THE ACT AND THE STATES CONCERNED ARE NOT UNABLE TO AGREE THROUGH THEIR PROPERLY CONSTITUTED AUTHORITIES, POWER COMPANY'S RATES TO NAVY ARE TO BE REGULATED BY STATE COMMISSION OR COMMISSIONS UNDER SECTIONS 19 AND 20 OF THE ACT.

(a) Petitioner attempts to disqualify Nevada Commission under Section 20 on legal grounds by the claim that Nevada Commission does not have extraterritorial jurisdiction to invade California and regulate the rate which Nevada users should pay for energy at Mill Creek, California. But this attack is rendered futile by the provisions of Section 20, itself, which requires a State Commission to have authority to regulate rates only "within such state."

(b) It is elementary that, where two parts of a statute are alleged to be inconsistent, it is the duty of the Court to reconcile the two parts if reasonably possible, so that both may be effective. Not only can the two parts be reconciled in this case, but they can be so reconciled as to form a simple and workable plan. This is done by simply treating licensees which are engaged in interstate commerce as a class to be regulated under Sections 19 and

20 so long as the conditions thereof exist and are complied with, and having other interstate utilities regulated under Part II.

V.

POWER COMPANY'S RATES TO NAVY ARE NOT SUBJECT TO FEDERAL REGULATION UNDER PART II OF THE ACT.

(a) Company's sales to Navy are not sales in interstate commerce as required by Section 201(b);

(b) Company's sales to Navy are not sales to a "person" as required by Section 201(d);

(c) Company's sales to Navy are not "at wholesale" that is, for resale as required by Section 201(d).

(d) If there is any sale of energy for resale in interstate commerce, it consists of only a minor part of the total, the rest being subject to regulation by California Commission. There is no commingling of energy on Company's system as claimed by Navy, but just the contrary, the delivery is of a uniform quantity of purely California energy, which the Navy disperses to various uses and purposes after it reaches the Ammunition Depot. The case of *Colorado Interstate Gas Co.* (*infra*) is exactly in point, holding that where the customer consumes part of the gas and sells the rest, the delivering company's rates are subject to federal regulation only as to the gas resold.

(e) Company's sales to Navy are merely part of Company's distribution service in Mono County, California, and, as such, are exempt from regulation under Section 201(b).

licensing act to an interstate commerce act, but for *the purpose of supplementing the licensing and special regulatory provisions of Part I applicable to licensees, with provisions for the regulation of those interstate transactions which were not already provided for.* The language of the Act indicates this by the stated purpose "to extend to those matters which are not subject to regulation by the States," (Sec. 201a.) *Licensees were already subject to regulation by the states.*

Part II is based entirely on the Commerce Clause, but Part I, except as to navigable waters, could not be upheld under the Commerce Clause; because, as to many, if not most, projects and licenses, there would be no interstate commerce involved, since, in many instances licensees were engaged only in intrastate commerce and since the majority of streams in the Western States available for power development are non-navigable. Accordingly, in the enactment of the Federal Water Power Act of 1920, later to become Part I of the enlarged Act of 1935, Congress was acting under Article IV, Section 3, Clause 2 of the Constitution giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property to the United States."

Congress has plenary power to deal with the public domain, and, hence, in disposing of it by sale, lease, license, etc., may attach any conditions it desires. It may subject any resulting intrastate commerce to Federal regulation or it may leave any interstate commerce to local regulation. If both intrastate and interstate commerce result, Congress may subject both to federal or both to State regulation or it may leave both unregulated.

The United States occupies the position of a landlord and the licensee occupies that of a lessee. The lease may

confer rights or impose burdens that could not be enacted under the Commerce Clause alone.

Camfield v. United States, 167 U. S. 518;

Light v. United States, 220 U. S. 523;

United States v. San Francisco, 310 U. S. 16, 29.

So there was no lack of power in Congress to provide that, *as a condition of the license,* the rates of a public service licensee applicable to either intrastate or interstate commerce should be subject to State regulation. Such provision was enacted in a proprietory capacity, not a political capacity, and not under the police power or the Commerce Clause.

But even in Part II of the Act, enacted solely under the Commerce Clause, Congress has left some interstate commerce to state regulation, as it may very properly do and as it has done in many instances and in many areas of commerce.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

In *Minnesota Rate Cases,* 230 U. S. 352, 402, the Court said:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence the absence of regulation by Congress in such matters has not imported that there should be no restriction, but that the states

should continue to supply the needed rules until Congress should decide to supersede them * * * In such case, Congress must be the judge of the necessity for federal action."

That rule was followed in *Pennsylvania Gas Co. v. Pub. Serv. Com.*, 252 U. S. 23, which held that, where gas was transported in pipes from Pennsylvania into New York where it was sold and distributed to the public, the New York Commission had authority to regulate the local feature of the interstate commerce, that is, the distribution, as implied merely from the failure of Congress to act. Later, as we know, this principle was affirmatively enacted into Part II (Sec. 201) of Federal Power Act and in the Natural Gas Act, placing the regulation of the local distribution part of interstate commerce in the control of the States, and also sales in interstate commerce for consumption by the purchaser.

Congress has gone further and delegated to the States authority to regulate the entire body of a given kind of interstate commerce.

In *United States v. South-Eastern Underwriters*, 322 U. S. 533, insurance business conducted on a national scale was held to be interstate commerce and subject to the Sherman Antitrust Act. But following the decision of 1944, Congress promptly passed the Act of March 9, 1945 (59 Stat. 33; 15 U. S. C. Secs. 1001-1015), in which Congress delegated the regulation of the whole interstate insurance business to the States, saying:

"1011. Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that the silence on the part of Congress shall not be con-

strued to impose any barrier to the regulation or taxation of such business by the several states.

"1102. The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation and taxation of such business."

The rule deducible from these and many other decisions is that, where a phase of interstate commerce is involved the local importance of which seems to predominate, as in *Pennsylvania Gas Co. v. Pub. Serv. Com.* (*supra*), and Congress has remained silent on the matter, the intent of Congress that state regulation shall function is implied unless and until Congress declares otherwise; but, where the main corpus of the commerce is involved and where the national concern seems to prevail, as in *South-Eastern Underwriters* (*supra*), mere inaction by Congress will not imply an intent that local regulation shall operate and there must be an express delegation of authority to the States.

Where, however, Congress does act and declares that all or any parts of interstate commerce shall be locally regulated, there can be no question of its intent. It is clear, therefore, that no constitutional impediment exists as to the segregation or delegation of regulatory powers between state and federal agencies under either Part I or Part II of the Act.

Public Utility Com. v. Attleboro S. & E. Co., 373 U. S. 83, is sometimes urged as an authority to discredit the power of Congress to delegate to the States regulation of interstate commerce as has been done in Part I of the Act. That decision has no such effect; it was decided in 1927 and was well known to Congress when, in 1935, the

Water Power Act of 1920 was amended and incorporated as Part I of the Act.

The *Attleboro* decision involved electric energy generated by the Seller, Narragansett Electric Lighting Company, in its plant at Providence, Rhode Island, and by it transmitted to the Rhode Island-Massachusetts State line where it was sold and delivered to the Attleboro Steam and Electric Company *for resale to the public in Massachusetts.* There are two reasons why that decision does not apply here:

(1) The Seller's plant was not a project on the public domain licensed under the Water Power Act or otherwise by the federal government, or under any statutory provisions or contractual stipulations imposed by Congress as in Part I of the Act.

(2) There was no act of Congress purporting to delegate to either or both states power to regulate the sale of electric energy for resale in interstate commerce. The whole main body of the commerce was involved as in *South-Eastern Underwriters* (*supra*) so that the mere silence of Congress did not justify the inference that there was any intent to leave the regulation to the States, just contrary to the condition which prevailed in *Pennsylvania Gas Co. v. Pub. Serv. Com.* (*supra*).

Attleboro (*supra*) deals merely with a situation where Congress has failed to act respecting interstate commerce; but no such question is here presented, for Congress has acted very explicitly in both Part I and Part II of the Act and has completely arranged the respective spheres of state and federal regulation. In both Parts, it has left regulation of some interstate commerce to the

States, and in Part I it has contingently provided for federal regulation of some intrastate commerce by FPC.

The differences in regulatory methods in Parts I and II of the Act have occasioned discussion calculated to becloud rather than elucidate Congressional policy expressed clearly enough in the Act. Much of this has been occasioned by failure to appreciate the different histories and different purposes of the two Parts, possibly in looking at the Act more with the eyes of a policy making legislator, rather than simply reading the intent of Congress already fully expressed; and, particularly, in employing modern concepts of expanded federal jurisdiction over interstate commerce to interpret the licensing provisions of Part I, as though that Part were an interstate commerce act, whereas its main subject matter is quite otherwise, interstate commerce coming in merely as an incidental possibility.

A purpose has been manifest to use Part II as a blanket to hide Part I and to obscure the fact that Part I has a function and purpose quite independent of, and quite as important as Part II. There is no indication that the important licensing and regulatory provisions of Part I were to be subordinated by the regulatory provisions of Part II, but the history of the legislation is quite to the contrary.

(g) Reconciliation of Parts I and II.

It is perfectly apparent that, in amending the Water Power Act of 1920 and incorporating it as Part I of the Act, the intent of Congress was to preserve the scheme which had been applicable to licensees for many years, and which was embraced as contractual stipulations in

> mitting of power is *not exercised by the state*, or by any duly constituted agency thereof, that the Secretary may upon the filing with him of formal complaint by the State, by a municipality, or by not less than twenty-five (25) customers or prospective customers of the Grantee, cause an inquiry to be made concerning the service or rate of payment complained of; and if it shall appear upon such inquiry that the service or the rate of payment complained of is unreasonable, the *Secretary may fix the character of the service and may name the rate of payment* which shall be rendered or charged." (Emphasis supplied.)

Here, we discern the pattern of the Water Power Act of 1920 beginning to take form. Both Secretaries required the permittee's rates to be *regulated by the State where the service was rendered*, and the Secretary of Agriculture provided that, if those functions were not performed by the State, *the Secretary of Agriculture would regulate the rates and service*, thus assuming essentially the same position as he later occupied as a member of FPC.

It is to be observed that these regulations made no distinction between the regulation by the State or by the Secretary of either intrastate or interstate commerce. Regardless of whether the permittee was engaged in intrastate or interstate commerce or partly one and partly the other, the State was to regulate in the first instance and, upon its failure, the Secretary was to perform the function. The legal justification for this, as later pointed out herein, was that the Right of Way Acts and the regulations thereunder were not bottomed on the Commerce Clause, but on Article IV., Section 3, Clause 2, of the Constitution, giving Congress plenary power over the public lands. Hence, in disposing of public lands by

sale, lease or permit, Congress could attach any conditions it saw fit, without invoking any powers under, or observing any limitations imposed by the Commerce Clause.

(c) Water Power Act of 1920.

The defects in the Right of Way Act of 1901, particularly, the indefinite tenure accorded the permittee soon became apparent to those interested in the conservation and development of natural resources, so that by 1914 it was generally realized that the law was inadequate for the promotion of the national interests. In that year, H. R. 14893 was introduced under the sponsorship of the Secretary of the Interior for the purpose of making more orderly, complete and dependable provisions for granting electric power rights. That bill did not pass, so that in 1917, President Wilson requested the Secretaries of Interior, Agriculture, and War, the last named presumably by reason of his interest in navigable waters, to prepare a bill on the subject, which the President could recommend to Congress. That was done and, though that bill failed to pass the 65th Congress, it was passed later practically unaltered, becoming the Federal Water Power Act approved June 10, 1920 (41 Stat. 1063).

The three Secretaries having participated in drafting the legislation, and in fact having been made *ex-officio* the members of the first 3-member Federal Power Commission in 1920, the Water Power Act naturally reflected ideas and policies which had grown up in the Departments. This was particularly true with respect to Sections 19 and 20, providing for the regulation of rates and services of those licensees which were public utilities. These sections preserved the basic idea of regulation which

had developed in the Departmental regulations, viz., *that the rates of all public service licensees were to be regulated in the first instance by the Commission of the State where the service was rendered, and, in the absence of such State Commission, by FPC.*

(d) Sections 19 and 20.

Sections 19 and 20 have not been amended since their original enactment in 1920, but were later incorporated intact in the enlarged Federal Water Power Act or Federal Power Act of 1935.

Section 19 provides that, *as a condition of the license,* every licensee which is a public service corporation (some are not) shall abide by such reasonable regulation of its services and rates as may be prescribed by the *duly constituted agency of the State in which the service is rendered or the rate charged,* but, if such state regulation is not provided, then jurisdiction is conferred on FPC, *until such time as the State shall have provided an authority for such regulation,* and the jurisdiction of FPC shall cease so soon as the State provides such regulatory commission.

Section 20, which has likewise been incorporated in Part I of the Act of 1935 without amendment, provides, that, if said power or any part thereof shall enter into interstate commerce, the rates charged shall be reasonable, non-discriminatory, and just to the customer, and that whenever *any state directly concerned* has not provided a commission or other authority to enforce said requirements *within such state, or such states are unable to agree,* jurisdiction is conferred on FPC to regulate so much of the rates and charges as may pertain to interstate commerce.

Two peculiarities are to be observed:

First: Section 19 does not apply solely to power generated in licensed projects or "project power" or even to power which contains an admixture of project power; it applies to all rates for all power sold by the licensee, even though generated in unlicensed plants. The scheme, therefore, seems intended to require of the license a general standard of conduct as to all its rates and not merely as to project power.

Secondly: Regulation under Sections 19 and 20 does not depend upon whether intrastate or interstate commerce is present, for, under various conditions, either or both may be regulated by State or Federal commissions. This is possible for the reason, later explained, that those provisions were enacted under the Public Property Clause, not the Commerce Clause of the Constitution.

By virtue of Section 6 of the Act, the provisions of Sections 19 and 20 are incorporated into each license and become contractual rights and obligations.

(A copy of the Rate Regulation Provisions which appear in all of Power Company's licenses is printed in the Appendix hereto.)

These licensees, usually issued for 50 years for the occupancy of public lands or navigable waters for power development, are not gratuities, but are in the nature of leases containing mutual terms and conditions binding on the United States and the licensee and, particularly, obligating the licensee for substantial charges and duties.

Under Section 10, the project must be designed to fit the comprehensive development of the waterway; no alteration in or voluntary transfer of the property can be made without approval of FPC; after the first twenty

years of operation, amortization reserves must be set up by the licensee which, in the discretion of FPC, shall be held until the termination of the license or used in reduction of net investment; the licensee must pay annual charges covering the cost of administering the Act and the rental value of government land occupied; if the licensed project is benefited by later work of the government or a later licensee, compensation must be paid therefor; and the licensee must convey to the United States land and rights of way necessary for the construction of navigation facilities, and furnish free power for the operation thereof.

One of the prominent concessions exacted by the United States from the licensee is that provided by Section 14 for the recapture of the project at the end of the term of the license. This is to be at "net investment," that is, the actual legitimate original cost, which, by reason of the inevitable inflation and loss in purchasing power of the dollar that goes on gradually but persistently all the time, decade after decade, is sure to be much less than the fair value, market value or cash value, or reconstruction value in money at some future date of recapture. Since 50 years will usually elapse between the original investment and the recapture, the payment will be made by the United States in dollars that will have lost much of their purchasing power.

The history of the present Federal Power Act, therefore, shows that Part I of the Act is, with amendments not material here, the Federal Water Power Act of 1920, which in turn embodies practices of the Departments of Interior and Agriculture which dated back to 1913 and 1915, particularly, with reference to the provisions of Sections 19 and 20. Therefore, in 1935, when the

present Act was adopted, there had been upwards of 20 years of experience with these provisions and FPC, itself, had been issuing licenses for 15 years under these same provisions. There can be no doubt that all concerned joined in approval of the general scheme of allowing all rates of licensees to be regulated by the State Commission or Commissions, if such were provided, otherwise by FPC.

(e) Part II of the Act.

Part II of the Act was enacted pursuant to the Commerce Clause, but it does not exhaust the powers of Congress over interstate commerce. In the first place, it does not displace certain regulation of interstate commerce by the States as provided for in Sections 19 and 20 and, in the second place, it does not apply to certain admittedly interstate sales which are exempted by various provisions and definitions of the Act.

Part II applies to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale (for resale) in interstate commerce; but it does not apply to sales (a) in intrastate commerce; (b) in local distribution; and (c) in interstate commerce, not for resale, but for consumption by the purchaser or the transmitter.

Connecticut L. & P. Co. v. Fed. Power Com., 324 U. S. 515, 525.

The same is true of the cognate provisions of the Natural Gas Act.

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Com., 332 U. S. 507;

Fed. Power Com. v. Panhandle Eastern Pipe Line Co., 337 U. S. 498, 502;

Panhandle Eastern Pipe Line Co. v. Fed. Power Com., 341 U. S. 329.

A second peculiarity of Part II is that the application of its various sections is not uniform. While the ownership or operation of facilities for the transmission of electric energy in interstate commerce or for the sale of electric energy for resale in interstate commerce, constitutes the owner a "public utility" (Sec. 201) and subjects the owner to the provisions of Section 203, requiring authority from FPC to sell, mortgage, lease or dispose of facilities subject to FPC jurisdiction and having a value in excess of $50,000; and subjects the utility to Section 204, requiring approval of FPC for the issue of most kinds of securities; and subjects the utility to various accounting and reporting requirements of Part III; those facts do not subject the utility to any rate regulation under Sections 205 or 206 unless it is selling such energy for resale in interstate commerce and, if it is, then only those particular rates are subject to FPC regulation.

In the Matter of Wisconsin-Michigan Power Co., Docket E-6268, June 1, 1951, FPC said:

> "A 'public utility' may or may not be subject to regulation under a particular section of Part II depending on whether the Section by its terms applies. Thus, under Section 205 of Part II, it is only those wholesale sales of a 'public utility' that are in interstate commerce which are subject to the Commission's jurisdiction. For that reason, notwithstanding our finding that Wisconsin Company is a 'public utility' we must next examine in this opinion the Com-

pany's operations as they relate to the wholesale sales to determine whether they are in interstate commerce, and, therefore, subject to our jurisdiction under Sections 20, 205 and 206 of the Act."

Applying this rule to Power Company, it means that the fact that the Company is a utility by reason of the transmission of electric energy over its own transmission line from Hoover Dam into California and from California into Nye and Esmeralda Counties, Nevada, has no bearing on whether or not the Company's rates to Navy or Mineral County are subject to FPC jurisdiction under Part II.

(f) Relation Between, and Constitutional Bases of Parts I and II of the Act.

Much, if not most, of what has been said by lower Federal Courts about the relative import of Parts I and II of the Act, their relation to each other and the possible inconsistency between them was rendered obsolete by the decision of this Court in *Fed. Power Com. v. Idaho Power Co.*, ... U. S. ....., 73 S. Ct. 85, decided Nov. 10, 1952. The basis for that briefly worded decision will, we believe, be more apparent if we repeat here substantially what we have contended from the beginning of the present litigation.

Parts I and II of the Act are not inconsistent though different, for they deal with different subject matters, and are based on different constitutional authority.

Part I is the primary and principal part of the Act which is the *Federal Water Power Act of 1920*, as amended. The Amendments consist mainly of the additions of Parts II and III, made, not for the purpose of repealing Part I or of changing the whole act from a

many licenses then still outstanding. We need not inquire whether this was deemed necessary in order not to impair the obligations of the contracts or whether it was still considered best even if a new policy were open for adoption. The fact that it was done is sufficient. Congress knows that new licenses are still being applied for and issued under these same provisions and stipulations and, yet, there is no evidence of any intent to alter or terminate them.

In any event, the result is that licensees, in consideration of the several contractual obligations assumed under Part I of the Act, occupy a different status from other persons and corporations engaged in interstate commerce and coming under the rate regulation provisions of Sections 201, 205 and 206 of Part II of the Act, but having no contractual relations with the United States. There is no inconsistency, no inadequacy, and no incongruity in this simple segregation, though its very simplicity seems to have been used to cast doubt upon it.

The supposed conflict, more apparent than real, between regulation under Sections 19 and 20 and under various provisions of Part II of the Act has been considered by several Courts in a number of cases. Some courts have gone to extremes to read complications into the Act, and it has been often suggested, though seldom held, that Part II repealed by implication portions of Part I.

The briefs and contentions of FPC in the several cases which have involved these matters leave no doubt that it does not look with favor upon Sections 19 and 20, and it invariably seeks to emphasize Part II by reversing what ordinarily would be the logical and natural order of discussing the two main parts of the Act. FPC follows the

practice of first discussing Sections 201, 205 and 206 and, then, referring to Sections 19 and 20, if at all, in a minor key as if they had in some way faded out and disappeared.

FPC's strategy has seemed to be rather quietly to ignore Sections 19 and 20 or to merge them into Sections 201, 205, and 206, so as to lose their identity.

Their psychological approach is this: first, to argue that Part II applies to the case, and, next, to ask what there is in Part I to the contrary, thus giving the impression that Part II is the main and basic part of the Act and casting the burden upon the opponents to show that Part I in some way repeals or displaces Part II. They ought, on the contrary, to proceed first to ascertain whether the facts bring the case under Part I, which is the original and basic part of the Act, and, next, to ascertain what there is in Part II which repeals or displaces Sections 19 and 20 of Part I.

So far as we have been able to observe, *FPC has never argued before any court that Part II repealed by implication any portion of Part I.* We believe they have not even suggested it. Undoubtedly, the reason is that FPC is looking to the time when the government may want to recapture projects at the expiration of the licenses, and anticipates that it might be met with the claim that the Government had breached the licenses by legislative rescission of license terms.

In the following cases it was held that Part II of the Act did not repeal any portion of Part I:

> *Safe Harbor W. P. Corp. v. Fed. Power Com.*, 124 F. 2d 800 (C. A. 3) (herein referred to as *First Safe Harbor*);

Safe Harbor W. P. Corp. v. Fed. Power Com., 179 F. 2d 179 (C. A. 3) (herein referred to as *Second Safe Harbor*);

Alabama Power Co. v. Fed. Power Com., 128 F. 2d 280, 293 (D. C. Cir.), cert. den. 317 U. S. 652;

Niagara Falls Power Co. v. Fed. Power Com., 137 F. 2d 787, 795 (C. A. 2), cert den. 320 U. S. 792.

But, in *Pennsylvania W. & P. Co. v. Fed. Power Com.*, 193 F. 2d 230, 239 (D. C. Cir.), the Court squarely held that Part II repealed Part I so far as the latter was intended to confer jurisdiction on State Commissions to regulate interstate wholesale rates. This was somewhat weakened, if not rendered dictum, by the fact that the Court also found that the Maryland and Pennsylvania Commissions were unable to agree, thus, under the language of Section 20, casting the jurisdiction on FPC, regardless of any implied repeal.

When the last cited case went to the Supreme Court (*Pennsylvania W. & P. Co. v. Fed. Power Com.*, ... U. S. ....., 72 S. Ct. 843), the Statute received somewhat different treatment, for this Court upheld regulation under Part II, without indicating what had become of Sections 19 and 20. This Court said simply that Part II was "a more expansive federal regulation," and that it would "hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation."

In view of the facts in that case, it seems that this language referred to a comparison between (a) Federal regulation under Part II and (b) Federal regulation under

Part I, and not to a comparison between (a) Federal Regulation under Part II and (c) *State* regulation under Part I, for the latter couple being of different nature could hardly be compared, or at least one could not be judicially proved better than the other.

At this point, it is necessary to observe that there are two different areas of dispute as to the application of Parts I and II to the regulation of licensees, and that failure to observe this difference may have led to misunderstanding.

First, there is, as in the case at bar and as in *First Safe Harbor* (*supra*), the initial problem as to whether State or Federal commissions have jurisdiction. If State commission or commissions have jurisdiction, FPC does not. But, if State regulation is absent or fails as provided in Sections 19 and 20, FPC has jurisdiction to the exclusion of the States.

Secondly, where FPC has taken jurisdiction in the absence or failure of State regulation under Sections 19 and 20, there is then the question whether FPC shall follow the procedure and technique provided in Part I (for example, Sec. 3(13) defining "net investment" and "actual legitimate original cost") or whether it may follow its general methods applicable to non-licensee interstate utilities under Sections 205, 206 and other sections of Part II. This question was presented in *Second Safe Harbor* (*supra*) and in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), but has not been raised in the case at bar and is not here ripe for decision. In the two cases last cited, the States of Pennsylvania and Maryland were found unable to agree, the same identical evidence being involved in both, that is, the letter written by Maryland Commission asking FPC to fix the rates.

It may very well be that, after FPC has once acquired jurisdiction under the express provisions of Sections 19 or 20, it is entitled to follow the same methods of regulation which it would use as to a non-licensee coming under Part II, and, in that respect, it might be said that it would be advisable, or preferable or promote the regulatory program for FPC to use its Part II procedure. This, therefore, was undoubtedly what the Court meant in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), for it would obviously be improper for this Court, in deciding a matter of statutory jurisdiction between State and Federal agencies, to give any consideration to what the Court might deem better, more helpful, or more satisfactory, such being a political, not a justiciable comparison.

The inability of the two states to agree having been found, this Court obviously did not intend, by omitting express reference to that crucial finding, to imply that FPC would have jurisdiction regardless of that finding, for in that case, FPC's jurisdiction would not attach under Sections 19 or 20, and it could not have jurisdiction under Part II unless that Part repealed Part I, which this Court has denied in *Fed. Power Com. v. Idaho Power Co.* (*supra*).

Moreover, this Court could not, by omitting reference to the States' inability to agree, give the decision or opinion a broader effect any more than it could do so by assuming facts not in the record. We take it that a judicial opinion is authority only with reference to the facts of record, and that, so far as it exceeds or disregards those facts, it is *obiter dictum*.

Therefore, all that *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*) established is that, where FPC jurisdiction has attached by reason of the failure of States to agree, FPC may apply, in addition to procedure under Part I, the more expansive procedure under Part II. That is a question of the *Second* class above described and is not involved in the case at bar.

This Court made the very significant statement that:

> "It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

It appears that the case at bar is such a case, for here there is no finding or evidence that any State Commissions are unable to agree. The only other case that we know of that has involved this situation uncomplicated by other issues is *First Safe Harbor* (*supra*) in which the order of FPC purporting to regulate Safe Harbor's rates was set aside for the reason that that Company, a licensee engaged in the transmission and wholesale of energy in interstate commerce, was subject to regulation solely by State Commissions, under Section 20, there being no evidence that they were unable to agree.

The different result in *Second Safe Harbor* (*supra*) was due solely to the finding of the Court that the Pennsylvania and Maryland Commissions were unable to agree, and the same finding *on the same evidence* was made in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*).

For the reasons we have stated, the decision of neither this Court nor the Court of Appeals in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), appear to be determinative of the issues in the case at bar.

But in *Fed. Power Com. v. Idaho Power Co.* (*supra*), this Court laid down fundamental principles which, for the first time, seem to afford the basis upon which all issues can be settled in the common sense way in which Congress undoubtedly intended.

By that decision, it is finally established that there was no implied repeal of Part I by Part II; that each of the two Parts performs a separate function and arises out of different constitutional powers and has different objectives. That opinion announces in concise language essentially what Power Company has contended in proceedings before FPC and California Commission; what the Hearing Examiner for FPC concluded and recommended; what California Commission wrote into Decision 45913; and what the Company contended before the Court of Appeals for the 9th Circuit in the companion case No. 495, this term.

In *Idaho Power Co.* (*supra*), this Court said:

> "Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy. * * * Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I which dates back to the Federal Water Power Act of 1920, 41 Stat. 1063. Section 4(e) of Part I gives the Commission power to issue licenses to private and public bodies for the purpose of 'constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other works'. * * *.
>
> "It is difficult for us to read Sec. 201(f) as in any way affecting that power. Sections 201(f) and

202 deal with interconnections of facilities generally. They do not extend the new powers granted by Part II to government lines. On the other hand they do not purport to change or alter any power granted under Part I. They do not deal with the grant of licenses. They do not purport to lay down conditions for the issuance of licenses for use of the public domain. We therefore cannot construe the limitation on the new powers conferred by Part II as a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain."

While *Idaho Power Company* (*supra*) did not involve regulation of rates, it did involve the possibility of interference by Part II provisions with the licensing provisions of Part I. Since the rate regulating provisions of Sections 19 and 20 are part and parcel of the licensing and conservation program of Congress set forth in Part I for power developments on the public lands, and are made contractual provisions of the licenses, they cannot, any more than any other part of that program, be subjected to interference from the provisions of Part II of the Act.

As we read the Act and the legislative history of the Act, particularly, of the additions of 1935, it was quite as much the policy of Congress to preserve the long-established and functioning regulatory machinery of the States as it was to set up the new federal regulation. Stated in another way, Parts II and III would not have been adopted had they contemplated interference with so elaborate and widespread an establishment as that consisting of the many State regulatory Commissions.

In considering the value placed by Congress on existing State regulatory establishments and its readiness to turn over to their care the regulation of some interstate commerce, it is helpful to observe that the interposition of a federal agency into a well ordered and functioning State regulatory pattern may be attended by awkward and unprofitable results. For example, in the present case, we would have FPC, a federal agency with headquarters some 3,000 miles away, injected as the sole arbiter of Power Company's rate to Navy (and one other customer involved in a companion case) the total demands of both not exceeding 2,500 or 3,000 kilowatts on Company's system with a peak load of over 200,000 kilowatts, and serving over 50,000 other customers located throughout eastern and southeastern California.

When California Commission regulates all those rates, it has a single undivided California public utility system before it, with one rate base, one set of revenues and expenses, and one body of consumers divided into several well recognized classes. It has but one fair return to find and one amount of revenue to provide that fair return, which revenue flows from one set of rate schedules apportioning the burdens of cost among different classes of service. It gives equal treatment to those similarly situated. In this case the P-2 schedule used for Navy was exactly the same rate as was paid by industrial consumers throughout Company's system.

But see what happens if FPC comes in to regulate the rates to Navy or even to one or more other consumers

like the Navy. Such special consumers are not served from separate plants and lines, but receive a part of a reservoir of power generated in many plants and dispatched over many lines. The amount of property or rate base which is devoted to that special service and the amount of the various items of expense incurred in supplying that service all have to be arrived at by allocation or estimation. That is complicated by the fact that electric rates are not "flat" as so many cents or mills per kilowatt hour, but are assessed on various sliding scales and load factor and power factor characteristics of the customer's business. In short, there is no completely mathematical method of apportioning to a 2,000 kilowatt customer using, say, 8,000,000 kilowatt hours per year, the exact amount of property out of a whole system producing, say, 200,000 kilowatts and 1,000,000,000 kilowatt hours per year. Nor is there any way of mathematically determining how much of many kinds of expenses should be allocated to such special customer.

The consequence is that, at critical stages throughout the computation, mathematical quantities must give way to estimates, allocations, judgment, taste, whim, prejudice, or arbitrary will. Hence, in the case supposed of California Commission regulating all of Company's rates, except those for two consumers, and FPC regulating those two, neither Commission is compelled to allow for what the other Commission will do or has done. They need not follow the same methods, probably will not. The results of the two rates do not have to add up to

100% of what either Commission would find for the system as a whole, though each Commission is sure to speculate as to what the other will do.

These consequences, if legally required, are unavoidable, but they are wasteful, inefficient, awkward, unsatisfactory and decidedly expensive, and ought not to be adopted unless clearly required by the Act, which they are not.

In answer to the above, our opponents may say that it is certainly equally bad to have two State Commissions regulating an interstate rate under Section 20 as to have one federal commission do so under either Section 20 or Part II. But this is not true. The scheme of regulation contemplated by the Departments as early as 1913 and 1915, written into the Federal Water Power Act in 1920 and continued in that act in 1935 and unamended now for over 30 years, is simple and workable. In the normal course of events, the procedure would be as follows:

The Commission of the State where the project is located and the energy is generated (say California) would regulate the rates of the licensee "within such state" and the rates so fixed would be charged at the plant or at the State line for energy moving in interstate commerce. Presumably those rates would be reasonable, nondiscriminatory, and just, because the Commission of the delivering State could not fix a higher rate for the interstate service than it does for the intrastate service, without disclosing discrimination and inducing the Commission

of the receiving state immediately to announce its disagreement, thereby *throwing the regulation into the hands of FPC under Section 20.*

The Commission of the delivering state would not overcharge its own citizens in order merely to overcharge interstate consumers. Hence, the interstate rate would not exceed the intrastate rate and the latter would, of course, be as fair and just as the Commission knew how to make it. With rates thus fixed by the State of origin, the process would normally be concluded under Section 20. No approval or other action by the receiving state or states would be called for. Only in the event the Commission of a receiving state found unfair discrimination against it, need it protest, and, if that protest were not satisfied or withdrawn, then, it could be said that the two Commissions were unable to agree, and the *jurisdiction would vest in FPC under Section 20.*

While it is possible under very unusual circumstances or with very large interstate commerce involved that the interstate compact clause of the Constitution (Art. I, Sec. 10, Clause 3) might be resorted to, as suggested by the Court in *First Safe Harbor,* such is not necessary. *Section 20 does not require that the states meet, confer, consult, or agree upon any topic.* It provides merely what is to occur if they are *unable to agree,* and, until one or both disclose their inability to agree, FPC has no jurisdiction under Section 20.

IV.

Since Power Company Is a Licensee Under Part I of the Act and the States Concerned Are Not Unable to Agree Through Their Properly Constituted Authorities, Power Company's Rates to Navy Are to Be Regulated by State Commission or Commissions Under Sections 19 and 20 of the Act.

Company is a licensee under Part I of the Act [R. 1]. Whether intrastate or interstate commerce is involved is immaterial under this branch of the argument, for, in either event, the State (California) in which the service is rendered and the rate charged, has authorized and empowered a Commission (Respondent herein) to regulate the same as provided in Sections 19 and 20 of the Act, and the States directly concerned (California and Nevada) have provided Commissions to enforce the provisions of Section 20 of the Act.

> Public Utilities Act of California (Stat. 1915, p. 115, as amended; Deering Gen. L., Act 6386);
>
> Public Service Commission Act of Nevada (Stats. 1919, p. 198, as amended; Nev. Comp. L. 1929, Secs. 6100 *et seq.*).

Neither does it seem material under this heading to draw a distinction between the operation of Sections 19 and 20 or to decide whether or not Nevada is a State concerned, because the case has been tried and argued throughout as involving only the choice between State and Federal regulatory jurisdiction, and not as involving any question as to whether one or two States should participate.

(a) Attempted Disqualification of of Nevada Commission.

Petitioner apparently regards the disqualification of Nevada Commission under Section 20 as a height which must be taken and held to gain the victory, for it resorts to the bizarre contention that Nevada Commission does not fulfill the requirements of Section 20, because Nevada Public Service Commission Act does not confer the extraterritorial jurisdiction to invade the State of California, figuratively at least, and regulate the rate at which consumers in Nevada may *purchase* power in California or to enter into agreements with the commissions of other states for the fixing of interstate rates.

This contention has nothing to commend it, except novelty. It is completely negatived by the language of the Act. Section 19 refers only to *"an agency of the State in which the service is rendered or the rate charged,"* which here means California. Section 20 requires only a "Commission or other authority to enforce the requirements of this section *within such state.*" Nevada Commission fully answers that description, without being expressly authorized to operate extraterritorially in California or elsewhere.

Petitioner cites Maryland Public Service Commission Law, Section 348, and Pennsylvania Public Utility Law, Section 913(a), to show that States do authorize their Commissions to make joint investigations with other State or federal Commissions, but those statutes were adopted in 1927 and 1937, respectively, long after Federal Water Power Act was adopted in 1920, and so Congress, in referring to State Commissions in Sections 19 and 20 of the Act, did not have any such State Statutes in mind.

Petitioner's contention is also remarkable in that, *in this very case, FPC held a concurrent hearing with California Commission which has no express statutory authority to participate therein.* FPC seemed to sense no disqualification of California Commission on that account. Moreover, FPC Annual Reports, at least ever since 1940, have contained a section listing cooperative proceedings and joint hearings held by FPC and State Commissions, many of which had no statutory authority to participate therein, and, among others, the present case is referred to in the Annual Report for 1950, page 137.

Obviously, no state can of its own authority operate extraterritorially so as to affect the rights of any person outside of that state. For the Nevada Commission to regulate the price at which a Nevada consumer might *buy* electric energy in California, if it had any effect at all, would be to fix the price at which a California utility might *sell* energy. Section 20 contemplates only the ordinary type of State Commissions each operating *"within such state,"* and it does not require that any State Commission operate without that state; nor enter into any agreement with the Commission of any other state, unless it be that failure to protest or object would be considered a tacit agreement. Section 20 speaks of what happens only if the state commissions are unable to agree. As above stated, the normal process would consist of the ordinary rate fixing procedure by the Commission of the delivering state. If that rate be not protested by the receiving state, nothing further happens; the situation is stable and satisfactory. It is only in the event that the receiving state protests or announces its disapproval, followed by no satisfactory adjustment, that the two states

can be said to be unable to agree, thus, calling for federal regulation under Section 20.

Not only can Congress not be supposed to have had in mind a State Commission which purported to operate with extraterritorial effect, but it can not be deemed to have had in contemplation one which fixed the price at which utilities under its jurisdiction might *purchase* energy, either within or without the state.

Neither the Federal Power Act nor state regulatory laws generally attempt to confer power to regulate prices at which utilities may *purchase* electric energy. The reason is plain. There is no more cause for a Commission to fix the price at which a utility can purchase electric energy than there is to regulate the purchase prices of coal, oil, materials, supplies, labor, salaries and many other items that enter into the cost of production or operation, many of them much larger than the cost of purchased power. Since the prices or wages which a utility could pay would necessarily fix the price at which the general public might sell, if they were to sell at all to the utility, a public service commission would eventually become a price and wage fixing agency of considerable magnitude.

Hence, all rate regulation applies to electric energy, gas or other commodities sold.

This point is illustrative of much of the discussion that has been indulged not only by FPC but by the Courts, wherein strange and sometimes almost alchemical mysticism has been written purportedly to ascertain the "intent of Congress" but in language and with results that few if any Congressmen would understand, for example; *Hartford E. L. Co. v. FPC.*, 131 F. 2d 953, certiorari

when this act was adopted, Congress had no idea that the Navy would be engaged in transmitting energy across a state line or anywhere or at all and had no thought that any definition of interstate commerce would be applied to the Navy or any agency of the United States.

Thirdly, if the Navy's transmission of electric energy is not interstate commerce under the Constitution, Congress could not make it interstate commerce by statute. Otherwise Congress could declare anything at all interstate commerce for the purpose of regulating it. Of course, Congress would not need to declare any act of Navy to be interstate commerce in order to regulate or govern Navy, for it already has that power. To apply Section 201(c) to Navy, rather extreme assumption would have to be indulged that Congress envisaged not only that Navy would be engaged in the transmission of electric energy but that it would purchase such energy in one state and transmit it into another, all to the end that Congress might regulate the company from which the energy was purchased. The possibility of any such combination was too remote and the objectives to be gained too speculative to justify the assumption that Congress had any such purpose.

As above stated, the only pretext upon which Power Company is attempted to be implicated in interstate commerce in this case is on the theory that the Navy is engaged in interstate commerce in electric energy, and that the Company, in participating in that operation by delivering energy to the Navy, is likewise engaged in interstate commerce. But since the Navy is not conducting any interstate commerce, it follows that the Company is not.

Even the Court of Appeals for the Ninth Circuit, in *California Electric Power Company v. Fed. Power Com.*,

..... F. 2d ....., No. 12,987, decided October 14, 1952, missed our point when the same argument was presented there, saying;

> "Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. Federal Power Commission vs. Arizona Edison Co., *supra*, p. 681. *The question is not whether the United States is engaged in interstate commerce, but whether the petitioner is.*" (Emphasis added.)

This seems to constitute an inferential admission that the United States (Navy) is not engaged in interstate commerce, but completely misses the necessary conclusion that neither is the Company, for there is no interstate commerce involved at all. The position of the Ninth Circuit would seem to have no logic or reason behind it. The meaning would be this: The Company and Navy are engaged in a combined operation, the only part of which could cause the joint operation to be interstate commerce being the part conducted by Navy, but Navy's part does not constitute interstate commerce, though the Company's part does! Evidently that court confused the idea of the Navy's *not being engaged in interstate commerce* with the idea of its *being engaged in interstate commerce but being immune from regulation.* In the former case, there being no interstate commerce, neither Company nor Navy would be engaged therein; in the latter case there would be interstate commerce and the mere exemption of Navy from regulation would not excuse Company.

The point seems never to have been critically examined by the Ninth Circuit, for, in *California Electric Power Co. v. Fed. Power Com.*, *supra*, that Court followed, without comment *Fed. Power Com. v. Arizona Edison Co.*, 194 F.

2d 679, where the opinion that government transmission of power across a state line was interstate commerce was expressed in a single short sentence and a footnote, based upon no precedent or expressed reasoning.

As we read *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, cited by Petitioner, it was decided on the theory that the mere fact that the manufactured products were consumed for war purposes and not for trade and barter, did not remove their shipment from interstate commerce. But that is not quite this case. Here, there is more than mere consumption by the Navy, for the Navy purchases, takes, and transmits the energy, as well as it consumes it. The Company claims that, from the instant of its generation, it is in the possession of the government and everything that is done with it which could be interstate commerce if done by a private person is done by the government, so that, the whole transaction is the performance of a national constitutional function which is neither commerce nor interstate. In *Powell v. U. S. Cartridge Co., supra*, the private employer not only manufactured but shipped the goods by common carriers. In the case at bar, the Company merely manufactures the enrgy and the government takes and transmits it over its own lines.

The actual situation is that, when Company delivers electric energy to Navy at Mill Creek, California, such energy passes out of the purview of Part II as any kind of commerce and becomes a part of the supplies of the Navy for national defense. *The very act of delivery to Navy which Petitioner claims puts the energy into interstate commerce is, in fact and in law, the act which removes it completely and irrevocably from any possibility of being either interstate commerce or commerce at all.*

(b) Company's Sales to Navy Are Not Sales to a "Person" as Required by Sec. 201(d).

Section 201(d) provides:

> "'The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any *person* for resale." (Emphasis added.)

Section 3 of the Act defines certain terms "for the purpose of this Act," that is, the whole Act, Part I, II and III. Paragraphs (3) and (4) of that section define "person," to mean an individual, private corporation, partnership, association or other private organized group.

Therefore the United States, the Navy and other governmental agencies are not "persons" which can be be engaged in resale within the meaning of the Act.

This has been so well expressed by the General Counsel for FPC in a brief, filed in August, 1951, in *United States ex rel. Chapman v. Fed. Power Com. and Virginia E. & P. Co.*, Nos. 6273 and 6274 in the United States Court of Appeals for the 4th Circuit, that we quote and adopt his language.

> "'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
>
> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise: the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T. V. A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would

apply to the Secretary of the Interior, T. V. A., and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314 (b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong., 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the

words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *

"From this action, it is abundantly clear that the Committee considered that 'person' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission', to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner admits that, according to the literal meaning of Section 201(d), Petitioner is not a "person" to whom energy can be sold for resale under the Act. But, basing its hope on such cases as *United States v. American Trucking Assn.*, 310 U. S. 534, Petitioner urges this Court to disregard the words "to any person" in Section 201(d), because, it is further asserted, these words crept in with an amendment to the Act and through an indavertence or

denied, 319 U. S. 741, but its reasoning disapproved in *Connecticut L. & P. Co. v. FPC* (*supra*); see also the *Second Safe Harbor Case* (*supra*).

It must be clear that Congress, in writing Sections 19 and 20, did not visualize novel or unusual or unheard of types of state regulatory commissions but only those of the common variety with which members of Congress were familiar in their home states.

(b) Reconciliation of Parts I and II of the Act.

No meritorious objection to the regulation of Power Company's rates by State Commission or Commissions under Sections 19 and 20 of Part I has been raised, except the assertion that, in some unspecified way, the jurisdiction has devolved upon FPC. Those sections are obviously not repealed by Part II. Hence, they must be considered and not merely ignored.

The rule is too well known to require citation of authority that, when two parts of a statute are seemingly in conflict, it is the duty of the Court to reconcile and make both parts work if reasonably possible. It is easily possible to do so. The rule does not mean that the court must be satisfied with the substance of the result as though the court were acting legislatively, but it means a reconciliation that is reasonable, practical, and workable which effectuates two seemingly but not really inconsistent intents of the legislature.

Any one can imagine that the amndments of 1935 to the Federal Water Power Act of 1920 might never have

been passed. Any one can imagine that, under those circumstances, regulation of Licensees' rates would have proceeded about as we have outlined, that is, the rates for both intrastate and interstate energy would have been fixed by the generating State. As to the interstate portion, no other procedure would have been necessary, unless or until the receiving state objected and failed to have its objection satisfied, whereupon, it would announce the failure to agree, and FPC would succeed to the jurisdiction.

Now, to reconcile, we have only to allow that system to continue, applying Part II to interstate utilities other then Licensees and possibly to Licensees if and when FPC has acquired jurisdiction of them under Sections 19 or 20.

Nobody has pointed out any meritorious objection to that reconciliation. It appears to reflect the intent of Congress, for it is settled that Congress intended Part I and Part II each to remain fully effective. While FPC has made it evident that it does not like that solution, the preferences of that body are not binding on the courts, and must be suspected of having some self interest or pride of office implicit in them.

Since Decision 45913 of the California Commission complies with the requirements of Sections 19 and 20 of the Act, and the present state of the record leaves jurisdiction in that Commission as against FPC, the Petition herein should be dismissed.

V.

Power Company's Rates to Navy Are Not Subject to Federal Regulation Under Part II of the Act.

Irrespective of the application of Sections 19 and 20 of the Act, the provisions of Part II, particularly Sections 201, 205, and 206, do not by their language or intent apply to Company's sales to Navy. This does not mean that such businesses must go unregulated. California Commission has always considered it a part of the operations of Company's California system and subject to regulation as other rates for distribution of electric energy in California.

The history of the legislation shows that Congress appreciated the existence of a well established and efficiently functioning system of utility regulation in practically all of the states, and did not desire to interfere with or disrupt that establishment. Indeed, this principle was written into the Act (Sec. 201(a)) where it is said that federal regulation is "to extend only to those matters which are not subject to regulation by the states." This principle was recognized by this Court and the reasons explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), at pages 525-530. It was there said that, while not the sole guide to the interpretation of the Act, it cannot be ignored and some consideration must be given to it. But it is to be feared that some have construed this to require only a nod of recognition in passing, without any appreciable effect on final conclusions.

Large classes of interstate commerce are omitted from the federal regulatory provisions of Part II and left to state and local regulation. Some of those omissions result from the language of Section 201, which states what

facilities and operations are to be included, and other omissions result from definitions. Some of these definitions are found in Part II applicable only to Part II and some are found in Section 3 of Part I applicable to the whole Act, Parts I, II, and III.

The classes of interstate commerce which are exempted from regulation under Part II are:

(1) Facilities and sales in local distribution are excluded by Section 201(b) even though electric energy imported from another state may be involved, which, as explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), constitutes typical interstate commerce down to the light bulbs or burner tips.

(2) Transmission or sale in interstate commerce where the energy is not resold by the purchaser but is consumed by the transmitter or by the purchaser is excluded by the provisions of Section 201(b). In order to effect federal regulation, there must be a two-step sale, that is, a sale to, and a resale by the purchaser.

(3) Transmission or sale in interstate commerce where the sales are made to governmental or public agencies or corporations, is excluded by definition in Section 201(d), where "sale of electric energy at wholesale" is defined to mean "sale of electric energy *to any person* for resale," and by Sections 3(3) and (4), defining "person" to mean a private individual, corporation, joint stock company, partnership, association, business, trust, organized group of persons, receiver or trustee.

Power Company's sales to Navy are not "sales at wholesale in interstate commerce" subject to Part II because—

(a) They are not sales in interstate commerce, the Navy not being engaged in interstate commerce either constitutionally or under the definition in Section 201(c);

(b) They are not sales to a person as provided in Section 201(d);

(c) They are not sales for resale;

(d) If there is a resale of energy, it involves only a minor part of the total, the rest being unquestionably subject to regulation by California Commission;

(e) Company's sales to Navy are merely part of Company's distribution service in Mono County, California, and as such are exempt from regulation under Part II.

Those points will be discussed separately.

(a) Company's Deliveries and Sales to Navy Are Not in Interstate Commerce.

Our position on this point has, at times, been misunderstood or misconstrued, for, if its true import is once recognized the whole interstate foundation for federal regulation of Company's dealings with Navy vanishes.

It is well established and thoroughly understood that a Company is engaged in interstate commerce if its facilities and operations participate in that commerce, even though they be located or occur wholly within a single state. Hence, the mere fact that the energy delivered by Power Company to Navy at Mill Creek, California, does not leave California on a line of the Company is immaterial. No point is made of that fact.

The crucial fact is, however, that the energy involved herein is generated in California and is purely intrastate and remains intrastate energy unless sale to, or the transmission thereof by Navy into Nevada makes it interstate. The further crucial fact is that the customer here, whom

for brevity we call Navy, is the United States, itself, acting through the Navy Department.

The maintenance and operation of the Naval Ammunition Depot, Hawthorne, Nevada, is a constitutional function provided for by Article I, Section 8, Clause 1 of the Constitution giving Congress power "to provide for the common defense," and Clause 13 of the same section, giving Congress power "to provide and maintain a Navy."

There is no provision in the Constitution giving Congress or the United States power to engage in interstate commerce. No one has supposed that the operations of the United States in carrying on national functions constituted interstate commerce or commerce at all. The United States, in the exercise of its constitutional functions, operates in the country as a whole, entirely oblivious of state lines and without any restrictions by reason of state lines. The idea that the United States or its armed forces, in defending or preparing to defend the country, are engaged in commerce, intrastate or interstate, is novel and incongruous. It would mean that the Navy, in sending recruits from various states to a Naval training station on Lake Michigan, or by flying an airplane from Washington to Key West, or dispatching a battleship from New York to San Francisco, would be engaged in interstate commerce, and, if such battleship were then dispatched to fire projectiles into Red Korea, that would be foreign commerce. Indeed it could, on that theory, be said that the Supreme Court, itself, is engaged in interstate commerce, because the Justices are assigned to and

occasionally make official visits to the Circuits or the Court publishes its opinions and decisions for interstate distribution, thus, coming under the same rule as newspapers and magazines.

> "Commerce among the states means commerce between individual citizens of different states."
>
> *Trade Mark Cases,* 100 U. S. 82, 96.
>
> "Interstate commerce is trading and trafficking in commodities between and amongst citizens of different states."
>
> *Wabash Co. v. Illinois,* 118 U. S. 557.

So unusual is the suggestion that the Navy, Army, Air Force or other national defense or other national functions constitute commerce or interstate commerce that there is very little judicial authority directly in point.

In *Georgia Power Co. v. T. V. A.,* 14 Fed. Supp. 673 (D. C. N. D., Ga.), the Court said at page 676:

> "There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The Federal Power over interstate commerce is to regulate it, not to engage in it. T. V. A. gets no help from that source. Its activities in selling electric power as pointed out in *Aswander, et al. v. Tennessee Valley Authority;* 56 S. Ct. 466, 80 L. Ed.—rest on the constitutional right of the United States to dispose of their property. That decision settles that electric energy generated at Wilson Dam and not needed for government purpose may be sold under authority of Congress, and that to effect sales transmission lines may be bought or built to a market for it; and this was held although

evidently the contemplated sale was not a transient or casual one, but a continuous operation amounting to a business."

In *Ashwander v. T. V. A.*, 297 U. S. 288, 330, 339, the constitutionality of T. V. A. operations was upheld solely on the authority of Article IV, Section 3 of the Constitution giving Congress power to dispose of property belonging to the United States.

To this apparent truth, answer will probably be made that, even if the transmission of electric energy by Navy is ordinarily neither interstate commerce nor commerce at all, it is made both by Section 201(c) of the Act which provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof."

But this definition cannot be deemed to apply to activities of the United States for three reasons: First, because statutes are deemed not to include the government unless it is especially mentioned.

United States v. Wittek, 337 U. S. 346;

United States v. United Mine Workers, 330 U. S. 258;

United States v. Cooper Corp., 312 U. S. 600.

Secondly, because Section 201(f) states that

"No provision of this Part shall apply to or be deemed to include, the United States, a state or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing," etc.

Hence the definition of interstate commerce does not apply to the United States or Navy. It is obvious that,

A rule of reason should be applied in utility law as well as other fields. If Navy's contention here be adopted by the Court, then, it follows that each and every industrial consumer can transform his business into the resale of electric energy by simply charging the night watchman 50 cents per month to light his guard house, for we are told that, in view of *Jersey Central P. & L. Co. v. Fed. Power Com.*, 319 U. S. 61, there is no rule of *de minimis* under the Act. If that be so, the sale of one kilowatt hour for 3 cents would produce all the consequences that would flow from the sale of billions of kilowatt hours for millions of dollars.

Of course, it is possible to say that the Quartermaster General of an armed service is a retail grocer, butcher, baker, tailor, druggist, etc., because he handles and distributes practically everything that is dealt in by the merchants of any City, yet Courts must be practical enough not to be imposed upon by metaphysical arguments, and, here, the Court ought to have no difficulty in finding that an industry's supply of electric service to its employees and others who are on the industry premises solely for the promotion of the industry's occupation is not resale in the public service which Congress had in mind.

(d) If There Is Resale of Energy, It Involves Only a Minor Part of the Total, the Rest Being Unquestionably Subject to Regulation by California Commission.

It is not even claimed by Navy or FPC that all of the energy delivered by Company to Navy at Mill Creek is delivered or used by Navy's employees and others on the Depot premises, but it was found by FPC [R. 37] that the amount "resold" during the years 1943-48 ranged

from 15.4% to 28.6%, the average being 18.7%, though, in 1949, it was 24%.

Hence, assuming that these amounts, varying from 15.4% to 28.6% were "sold for resale" as mentioned in Section 201(d) of the Act, only those amounts would come within the regulatory powers of FPC as "the sale of electric energy at wholesale in interstate commerce." The remaining 71.4% to 84.6% would be "other sale of electric energy" to which Part II of the Act does not apply.

To meet this apparent defect, Navy and FPC have asserted that, although only an average of 18.7% of the total energy is even claimed to be resold, yet, this part is "commingled" or "inextricably commingled" with or "indistinguishable" from the major part of the energy which is admitted to be consumed by Navy.

But this is a complete misrepresentation of the conditions. There is no commingling of two kinds, classes, or supplies of energy, but just the contrary. There is a sale to Navy of only one uniform supply, which, however, Navy, for its own purposes, divides and dispatches to several different places and uses on the Depot Reservation, among which are its employees' houses. So far from being a commingling, this is a dispersion, and, since Navy is solely responsible for this dispersion and has complete control over it, Navy cannot hide behind any such assertion that it operates so as to prevent any one from detecting what it does with the different parts.

The theory of "inextricable commingling" is based on the idea that particles of electric energy or kilowatt hours cannot be distinguished or identified, one from the other, so that, if quantities of energy from different sources get

into a single line, they can never be separated. Presumably, then, one who, in addition to his own electric energy, get possession of some one else's energy in the same line would own the whole, for the other claimant would have no way of identifying his own kilowatt hours, even though it were admitted that he owned some in the mixture. The same theory would be applicable to water in a reservoir, irrigation ditch, or pipe line, and to oil in tanks, grain in elevators, and all kinds of fungible goods. This theory would set back electrical practice, irrigation practice, and many commercial practices by at least 50 years, and some much longer. The practice of measuring into a line, ditch, reservoir, tank, elevator, etc., two or more supplies of electric energy, water, oil, grain or other fungible goods is too well established to permit any such quibbling.

It appears from *Idaho Power Company v. Fed. Power Com.*, 189 F. 2d 665 (C. A. D. C.), and the decision of this Court on certiorari, Nov. 10, 1952, *Fed. Power Com. v. Idaho Power Co.* (*supra*), that FPC, itself, with later approval by this Court, issued a license under Part I of Federal Power Act for a transmission line, with a provision requiring the license, Idaho Power Company, to receive and transmit over that line, along with that Company's own energy, energy supplied by the government. Is it contemplated that having got the government's power into its line, Idaho Power Company will be able to retain the whole power supply, because the government will be unable to identify and repossess the particles or kilowatt hours of energy which it fed into the line?

Navy seeks to answer this argument by citing several cases, none of which are in point. Those cases involve just the opposite factual situation from the case at bar.

They would be applicable if Power Company generated some energy in California and purchased some generated by Navy in Nevada and then sold this commingled supply in California.

All of the cases cited by Navy involved situations of that kind, where the utility had on its system, mixed and constantly varying supplies of intrastate and interstate energy which were delivered to various customers in various places, at various times, and in varying amounts, no effort being made by the utility (as would probably have been impossible) to ascertain from time to time, how much of each kind of energy was delivered to the many customers respectively.

We may take *Pennsylvania W. & P. Co. v. FPC*, ... U. S. ....., 72 S. Ct. 843, as the latest case and as typical of all cases cited on this point by Navy. Speaking of Penn Water's contention that its sales in Pennsylvania to Pennsylvania consumers were not in interstate commerce, the Court said (p. 846):

> "(2) It is contended that some of Penn Water's sales at wholesale were not 'in interstate commerce' and therefore were not subject to federal regulation under Part II. This contention refers to sales made by Penn Water in Pennsylvania to Pennsylvania customers. These are alleged to constitute about 83% of Penn Water's total business. Because of the following circumstances we agree with the Commission and the Court of Appeals that these sales were 'in interstate commerce.'
>
> "Penn Water and Safe Harbor Water Power Corporation (Safe Harbor) have hydrogenerating plants on the Susquehanna River in Pennsylvania. Consolidated operates large steam-generating plants

in Baltimore. The flow of the Susquehanna varies greatly even from day to day. During periods of low flow, Penn Water receives steam-generated energy from Baltimore in order to met its power supply commitments. Conversely, during periods of high flow, consolidated is able to receive the cheaper hydro-power from Penn Water and Safe Harbor. For many years Penn Water, Consolidated, and Safe Harbor have been operating under contracts for the coordinated sale and distribution of electric power in Maryland and Pennsylvania. A complete integration and pooling of the power producing and transmitting facilities of the three companies was thus achieved. With reference to this coordinated system of production and distribution, the Commission said:

" 'The central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part. * * *

" 'In this manner energy crossing the State boundary, with other system energy, is used to fulfill system requirements. There results times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Energy flows in, across and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

" 'It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may in-

volve energy never crossing the State boundary.' 8 F.P.C. 1, 12, 15.

"We hold that the Federal Power Commission has complete authority to regulate all of this commingled power flow. The Commission's power does not vary with the rise and fall of the Susquehanna River."

In the case at bar, however, Power Company has no commingled energy on its system. It is all purely California energy unmixed with any other until it reaches the place of use by customer, the Navy, at the Ammunition Depot, where the Navy parcels it out partly for the operation of machinery, partly for lighting the grounds, partly for the service of employees required to be on the Depot premises for the operation thereof, and partly for various other uses of the Depot.

The case at bar is precisely like *Colorado Interstate Gas Co. v. Fed. Power Com.*, 185 F. 2d 357 (C. A. 3). There Colorado Interstate sold gas to Public Service Company, a local distributing public utility, and also to the City of Colorado Springs, which operated a municipal distribution system. Both customers, however, not only sold and distributed the purchased gas to the public, but consumed gas for the operation of boilers for the generation of electric energy. Consequently, under Section 1(b) of the Natural Gas Act (15 U. S. C. 717(b), identical in effect with Section 201(b) of Federal Power Act), and the decisions in *Panhandle Eastern Pipe Line Co. v. Public Serv. Com.* (*supra*), and other cases, the portion of the gas sold by Colorado Interstate to the two customers which was resold by these customers to the public was subject to FPC regulation, while the portions consumed

"quirk of draftsmanship utterly unintended." It offers no proof of this; indeed its case seems to depend on the absence of any evidence and to gain whatever force it has from the fact that the legislative history is silent on the point of how, why or by whom the critical words were added.

Respondent Power Company fully appreciates the length to which such cases as *American Trucking Assn.* have gone, but believes this Court has never yet done anything so extreme as Petitioner asks it to do here. In that case, the Court, after declaring that

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," (p. 543),

passes by the necessity for disregarding words which produce "absurd or futile results" and comes to the field where the present case is supposed to rest, that is, where

> "* * * the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' * * *" (p. 543),

and concludes that

> "*A few words of general connotation* appearing in the text of Statutes should not be given a wide meaning *contrary to a settled policy*, 'excepting as a different purpose is plainly shown,'" (Emphasis added); (p. 544).

The question there was whether the Motor Carrier Act which authorized Interstate Commerce Commission to prescribe "maximum hours of service of employees,"

applied to all employees or only those who operated motor vehicles. The former, said the Court (p. 544), would bring a result "quite distinct from the *settled practice* of Congress," which "has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only." (Citing three such acts of Congress and referring to similar acts in forty states) (p. 545).

Finally, the Court said (p. 545) that the word "employee" was not a word of art and concluded that only those operating motor vehicles on the highways were included under the Act.

There are several clear distinctions between such cases as *American Trucking Assn.* and the case at bar.

(1) Here the word "person" is a word of art, precisely defined and precisely used, and not merely one of "general connotation." Throughout the Act, the word "person," sometimes with another word qualifying or adding to it, is employed repeatedly and with fine distinction. In addition to its appearance in Section 201(d), the word "person" is used no less than 12 times to include only natural persons, firms, private corporations and the like, to-wit: in Sections 201(e), 202(b), 202(d), 202(e), 304(b), 305(b), 307(c), 307(g), 314(a), 314(b), 316(a), 316(b). Without words of qualification, it is never used to indicate anything but private individuals, corporations and other private interests. In at least 6 places, where there was a purpose to include both private interests and governmental or public bodies or corporations, there were used, in addition to "person," such words as "State," "municipality," "State Commission," etc., to-wit: in Sections 3(13), 23(b), 303, 306, 309(a), 313(a).

(2) The application of Section 201(d) according to its literal meaning does not conflict with any "practice of Congress" and is not inconsistent with any other legislation.

(3) The literal application of Section 201(d) presents no absurd or even unreasonable or unworkable results, nor does it involve any dispute of jurisdiction between FPC and any other federal regulatory agency as in *American Trucking Assn.*

(4) The claim that administrative construction has been contrary to the literal meaning of Section 201(d) and should have weight is without merit, because the first case in which FPC held that it had jurisdiction of rates to municipalities for resale purposes was *Otter Tail Power Co.* (2 FPC 134, 137, 33 PUR NS 257, 260), decided as late as 1940 and not contested for the reason that Otter Tail Power Company requested FPC to take jurisdiction over such rates. The only contested cases were:

Connecticut Light & Power Co., 3 FPC 132 (after 1940);

In the Matter of Wisconsin-Michigan Power Co., FPC Docket E-6268, June 1, 1951;

In the Matter of Interstate L. & P. Co. and Wisconsin P. & L. Co., Docket E-6252, Opinion 215, July 12, 1951.

Certainly that brief and recent experience does not constitute administrative construction.

In *Pacific P. & L. Co. v. Fed. Power Com.* (C. A. D. C.), 184 F. 2d 272, it was held that even though FPC had, over a period of 20 years, issued hundreds of licenses for minor transmission lines purportedly under authority

of Section 4(e) of the Act, and even though such licenses were still outstanding, such did not constitute an administrative construction of Section 4(e); and, hence, such minor lines not being "projects" were not within the licensing jurisdiction of FPC.

Petitioner cites *City of Los Angeles v. The Nevada-California Electric Corp.*, 2 FPC 104, 32 PUR NS 193, as of the same type as *Otter Tail Power Co.* (*supra*) and as holding that sales to a municipality for resale are sales to a "person." But that case is cited in error, for no sales at all were involved therein, and, hence, there was no opportunity for any application of the definition of "wholesale" as "sale to a person." In that case, the Company had contracted to transmit power for the City of Los Angeles from Hoover Dam to Los Angeles for a consideration. The power consisted solely of that allocated to the City by the United States at said Dam and belonged to the City from the instant of its generation, the Company at no time having any interest therein. The transaction came under the jurisdiction of FPC as a "transmission of electric energy in interstate commerce" as provided in Section 201(b) and not as a "sale of electric energy at wholesale."

(5) There is no patent defect in Section 201(d) as there is, for example, in the next to last line of Section 205(c) of the Act, where "regulate" is clearly an erroneous substitution for "relate." Nor is there anything incongruous or awkward, or inconvenient, or unworkable about Section 201(d). Its only fault is that certain influential people do not like it. They say it is contrary to the main purpose of the statute, but how do they prove that? The only evidence as to the purpose of the statute

with respect to regulation of sales to governmental bodies and public corporations for resale is set forth in Section 201(d), itself, reinforced by Sections 201(e) and 201(f).

The fact that Section 201(d) exempts a certain class of interstate commerce in electric energy does not make it inconsistent with the rest of the Act, for it is admitted that two other classes of interstate commerce are omitted by Section 201(b): (i) distribution of electric energy, even that which has moved in interstate commerce, and (ii) transmission or sales of energy in interstate commerce where the energy is not resold, but is consumed by the transmitter or the purchaser. The consequence, therefore, of one or the other construction of Section 201(d) is merely to include more or less interstate commerce under the Act or to exempt less or more. Neither is inconsistent with the rest of the Act, the only question is: where did Congress draw the line between federally regulated and unregulated sales.

This Court itself has said in *American Trucking Assn.:*

> "Obviously, there is danger that the Courts' conclusion as to legislation purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body."

Petitioner cites other cases which fall within familiar rules of construction but not closely in point here, for example, *Lawson v. Suwanee S. S. Co.*, 336 U. S. 198, where the literal definition in the statute produced obvious incongruities and absurd results, and *Ohio v. Helvering*, 292 U. S. 360, where the statutory definition, it-

self, invited exceptions and indicated that it was not of universal application, thus:

> "Where not otherwise distinctly expressed or *manifestly incompatible with the intent hereof*, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person." (Emphasis supplied.)

Petitioner here assumes a desperate and dangerous position. A desperate position in that it asks this Court to take one short phrase in Section 201(d) reading—

> "a sale of energy to any *person* for *resale*"

and to twist "person" one way and "resale" the other, that is, to place such a liberal construction on the former as to eliminate it, and such a strict construction on the latter as to include internal transactions between the Navy and its officers, personnel and employees operating the Ammunition Depot, such as accounting for electric energy used in habitations maintained on the Reservation, treating such internal transactions as typical utility resales to the public in public service.

Petitioner's contention is dangerous, for it could equally well be applied to practically any statute which is extensively amended on its course through Congress.

It would virtually establish a rule that, *where a bill is amended on its way through the legislature, no critical words inserted by an amendment will be given effect by the Courts unless the amendment is accompanied by a Committee or Conference Report showing the intent to insert such words and the purpose thereof.*

Any statutory language could be disregarded which the judges do not *now* think reflects what ought to have been the Congressional intent a decade or two ago, or which does not express what it would have expressed if the Court had been the legislature.

It can hardly be shown that Congress did not know what it was doing when it used "person" in Section 201(d), because the same word appeared with the same limited meaning in the very next paragraph, 201(e), and both were followed by 201(f) which confirmed and reinforced them by declaring that *no provision (which of course included the definitions in (d) and (e) just above) of Part II should apply to the United States, a State, etc., etc.*

Lengthy hearings and debates were held on the Act and such experts as Commissioner Seavey of FPC and Mr. Dozier A. DeVane, Solicitor for FPC, were in attendance, testifying, watching, and assisting in passing the legislation. (Senate Hearings on S. 1725, Apr. 16-29, 1935, 74th Congress, pp. 223, 224, 232-257; House Hearings on H. R. 5423, 74th Congress, 1st Session, Feb. 19, 1935, pp. 384-559.)

It is significant that Section 201(d) has remained undisturbed for 17 years and, if it contained such glaring misprision, such egregious blunder as now alleged so as adversely to affect the United States, the forty-eight states, and several thousand municipalities and governmental agencies, certainly FPC would have asked Congress to correct the error. That it did nothing of the kind indicates that it had no hope of success from that source, but preferred to accomplish the purpose by its own decisions and those which it could persuade the Courts to make.

May we not suggest that, in view of the fact that the Congressional avenue is still open, it would be inappropriate for this Court to take such unprecedented liberties with legislation functions as it is now asked to do.

(c) Company's Sales to Navy Are Not "at Wholesale," That Is, for Resale.

Navy makes the colorable but insubstantial claim that, because it assesses, along with rent for houses and quarters, a small charge for lighting and other electric service to Naval Officers and Naval and civilian personnel and others who are living or doing business on the Depot reservation for the maintenance and operation thereof, and who would not be there otherwise, it is engaged in the resale of electric energy with the same effect as if it were a public utility selling energy in public service.

Service to Navy began with the Contract of July 1, 1943, which was negotiated between Company and Navy, with the intervention of FPC. It provided for the sale and delivery by the Company at Mill Creek, California, of electric energy "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada."

Naturally the Navy, the Company, and FPC knew that the operation of the Depot did then, and would continue to require the presence of Naval Officers, Naval personnel, armed guards, civilian operating employees and others, many, if not most of whom would have to dwell on the Depot premises as in the case of any military post or base. It was obvious that all these persons would receive electric service in their dwellings and quarters just as they would need water, telephones, garbage disposal and other services customary in such cases.

Whether or not the charge for electric service were separately stated on monthly bills or regarded as a separate charge is immaterial, for, if houses and quarters were rented with electricity furnished, the cost of that service would be inevitably included in the rent. The cost would be there and the value would be there and, if there were a sale where a separate charge was specified, there was equally a sale where the charge was included in the rent.

But none of the parties, at the time the contract was negotiated or for seven years thereafter, considered that the service of employees and others on the Depot premises for the maintenance and operation thereof, was a sale or resale of electricity but all of them considered it "for use of the Naval Ammunition Depot" and so expressed the purpose in the contract.

Now, when Navy presented its complaint to FPC resulting in the Order to Show Cause of February 15, 1950 [R. 3], it was obvious that FPC had no jurisditcion thereof unless Company's sale to Navy was a "sale for resale." In said Order to Show Cause, for the first time, the service to Navy was alleged to be sale for resale, and then obviously as an afterthought and make-weight to give FPC jurisdiction.

Indicative of the good faith of the Company is the fact that, after California Commission's Decision 41798 of July 1, 1948 [R. 2] prescribing Schedules P-2 and P-3 naming higher rates than previously charged, Company began to charge Navy under Schedule P-2 applicable to industrial consumption, though at the same time it applied Schedule P-3 (quoting somewhat higher rates than P-2 and applicable to sales for resale) to a neighboring customer, Mineral County Power System, which was ad-

mittedly engaged in resale of energy to the public of Mineral County [R. 6].

Mineral County, Nevada, like Mono County, California, is desert, mountainous and sparsely settled. The town of Hawthorne is an old settlement, but small and entirely inadequate to accommodate such influx of civilian workmen as were imported to work at the Ammunition Depot during the last war. In addition to quarters usually provided for Naval officers and Naval personnel at such bases or posts, Navy was forced to construct a housing project on the Reservation to provide quarters for workmen at minimum rentals, and, for obvious social reasons, supply stores, businesses, and recreation facilities, such as a moving picture theatre, had to be provided. All this was a part of, and necessary for the fulfillment of the purposes of the Depot, otherwise, Navy would not have allowed civilians on the premises or provided any accommodations for them.

Navy's claim that the supply of necessary dwelling services at minimum or token charge (electricity 1½ cents per kilowatt hour) constitutes the business of reselling electric energy, is hypercritical if not quibbling. These persons were cut off from the general public by the necessity for maintaining military discipline and security. They had to be and were subject to summary ejectment from house and Depot by Order of the Commanding Officer.

The regulation of the rate charged by Company to Navy has no appreciable effect on any charge for electricity made by Navy to its employees, because any charge made by Navy is merely a matter of internal accounting routine and the election rests entirely with Navy whether it makes a high charge, a low charge, or no charge at all.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
JAN. 5 1953

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

EVERETT C. McKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
514 State Building, San Francisco 2, California,
Attorneys for Respondent Public Utilities Commission of the State of California.

by the two customers for boiler purposes was subject solely to State regulation. The Court said (syl. 3):

> "Nothing need be added to this clear statement of the coverage of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sales to buyers for their own consumption. That being the extent of the authority which Congress has conferred upon the Commission that body is without authority to compel Colorado Interstate to make its gas tariff applicable to any sales other than those for resale. It is beyond the power of the Commission to require a natural gas company within its jurisdiction to make its tariff applicable to sales which are not within the regulatory powers of the Commission for this would be in effect to regulate such sales. Indeed the Commission itself recognized this in 1945 when in accepting Colorado Interstate's earlier tariff changes for filing it specified that they were to be effective only for sales 'for resale for ultimate public consumption.' It necessarily follows that the applicability clauses of Colorado Interstate's FPC Gas Tariff, Original Volume No. 1, which the Commission disallowed should have been allowed since they did no more than limit the applicability of the tariff to those sales which were within the Commission's regulatory jurisdiction."

Hence, if all other points in this case were decided for Navy, the most that California Commission could be required to surrender would be jurisdiction over rates ap-

plicable to *energy resold by Navy*, and said California Commission would retain jurisdiction over rates for that major portion of the energy which the undisputed evidence shows is consumed by Navy.

There can be no mechanical difficulties in connection with measuring the several parts, for the Findings made by FPC [R. 37] show that the respective amounts of energy consumed by Navy's machinery, etc., and that furnished employees and claimed to be resold has, for some years, been metered to a fraction of one per cent. Indeed, no commodity of comerce can be measured with such accuracy as electricity, and electric devices are the instruments by which the most accurate measurements of other things are made.

As in *Colorado Interstate Gas Co.* (*supra*), it is not necessary for this Court to decide whether or not any past or existing conditions or transactions at Hawthorne Ammunition Depot constitute resale of energy in interstate commerce subject to regulation under Part II of the Act. Indeed, it would be quite useless to do so, first, because past conditions may not continue, and, secondly, because in the future, new conditions or practices may exist which have not existed in the past. The most that the Company can be required to do under any circumstances would be to file a schedule with FPC applicable to any energy sold to Navy for resale in interstate commerce. If such occurs, the schedule covers it; if such does not occur the schedule is inoperative.

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(e) Company's Sales to Navy Are Merely Part of Company's Distribution Service in Mono County, California, and as Such Are Exempt From Regulation Under Part II.

A distribution system need not be a *typical* distribution system. Company's distribution system and business in Mono County are certainly not *typical* of larger centers of population such as cities or even closely built rural areas. Mono County is a remote, mountainous county, with an average elevation of more than 7,000 feet above sea level, a very sparse population, and little industry, except mining and cattle grazing. Power Company distributes electric energy to the public in said County where and to the extent demanded, but it cannot create power demands or multiply customers beyond the capacity of the County's population and economy. Power Company's facilities at and about the Mill Creek Plant, including the 55 kv line extending from Mill Creek to Leevining substation are used principally for the distribution of power in that locality, including the Navy's purchases for use in its Ammunition Depot.

There is no generally recognized standard of distinction between the transmission and the distribution of electric energy, either engineeringly or legally, and, if facilities are used at all in local distribution, that ends the matter so far as FPC jurisdiction is concerned, even though they are also used for transmission.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

Section 201(b) exempts facilities used in local distribution, but does not require that they be used exclusively for that purpose. If they are used for local distribution

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at all, they are exempt. The situation is analogous to that in *Jersey Central P. & L. Co. v. Fed. Power Com.* (*supra*), where it was held that, since the transmission of electric energy in interstate commerce constituted the Company a public utility under the Act, and since Congress had not specified any percentage no matter how small that might be disregarded, therefore, the transmission of any energy whatever in interstate commerce, even unintentionally, was sufficient to include that Company. So here, since Congress has not specified any amount or proportion of distribution that must be carried on to constitute "use in distribution," any distribution at all is sufficient to exempt facilities from FPC jurisdiction. Since the facilities are used in distribution, the energy sold therefrom is sold in distribution and is purely intrastate commerce.

Conclusion.

Navy asks this Court, in effect, to get around no less than six major obstacles, to say nothing of several lesser ones, in order to decide this case for Petitioner.

1. There is the obstacle provided by Sections 19 and 20, that, under present conditions, regulation rests with a state or states, and not with FPC.

2. There is the obstacle that Company is not engaged in interstate commerce so far as its own lines are concerned and can only be engaged in interstate commerce by reason of Navy's transmission if Navy is engaged in interstate commerce, which Navy is not, either constitutionally or by reason of statutory definition.

3. There is the obstacle that Company's sales of electric energy are not sales to a person and, therefore, cannot be within the Act.

4. There is the obstacle that Company's sales to Navy are not for resale, but are and were always understood to be for the operation of the Ammunition Depot.

5. There is the obstacle that, even if Company is selling Navy energy for resale in interstate commerce, such constitutes only a minor part of the whole, and the larger remainder is clearly subject to state regulation.

6. There is the obstacle that Company's service to Navy is not typically a transmission service, since the Company sells and delivers the energy at Mill Creek, the principal transmission being performed by Navy, and, therefore, Company's service resembles the distribution service to its consumers in the same locality in Mono County and is a part of its local distribution, exempt from Part II of the Act.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for Respondent, California Electric Power Company.

H. M. HAMMACK,
KENNETH M. LEMON,
Riverside, California,
Of Counsel.

APPENDIX.

Rate Regulation Provision of Licenses.

Article 23 of Licenses for Projects 1388 and 1390, Article 25 of Project 1389, and Article 28 of Project 1394.

* * * * * * * * * *

"The licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale, or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control; provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1952.

12-31-52—80

agreement of the two commissions, a concurrent hearing was held to explore the jurisdictional question (R. 7). Subsequently, each commission rendered its opinion, each finding that it, rather than the other commission, had jurisdiction (California Commission Decision No. 45913, issued July 3, 1951 (R. 6-19); Federal Commission Opinion No. 212, issued April 13, 1951 (R. 24)). The Federal Commission opinion had been preceded by a federal hearing examiner's decision which coincided with the California Commission's views and denied Federal Commission jurisdiction (No. 495, this Term, Tr. of Record 13-52).

The California Commission Decision No. 45913 was made the subject of petition for writ of review filed by the United States (Navy) before the California Supreme Court. That Court's action denying review (R. 68) constituted a determination upon the merits.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951, ch. 764; formerly Public Utilities Act, Section 67)

Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920)

Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 747 (1936).

Subsequently, the California Supreme Court denied rehearing (R. 74) and the cause was then brought here upon writ of certiorari.

The Federal Commission Opinion No. 212, on the other hand, was made the subject of review before the Court of Appeals for the Ninth Circuit. That

Court affirmed the Federal Commission's opinion (*California Electric Power Co. v. Federal Power Commission*, 9th Cir., No. 12987, decided October 14, 1952). Petition for writ of certiorari is now pending before this Court (this Term, No. 495).

The California Commission, in its decision here challenged, concluded that it had jurisdiction over the sales by California Electric Power Company to the Navy and that its earlier general rate increase decision should be construed to apply to such sales, but it did not order the Company to charge certain rates; it merely *authorized* the Company to charge the rates in a certain Schedule P-2 designed for wholesale sales (R. 19). The reason for authorizing rather than directing the imposition of specific rates lay in the fact that, pursuant to Public Utilities Code, Section 532, the Commission had, in 1942, issued a general order (General Order No. 96), providing in Section X-B thereof that an electric utility could, if it saw fit, furnish service to the United States and its departments at "free or reduced rates." The effect of the Commission's decision was thus merely to place a ceiling on the rate which the Company could charge the Navy, leaving the parties free to negotiate for any lesser figure (R. 12).[1]

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[1] In the foregoing statement, reference has been made not only to the transcript of record before this Court in this proceeding but also to the transcript of record before this Court in the cognate proceeding No. 495, this Term, (respecting which petition for writ of certiorari is pending). While we would have questioned the propriety of such course, petitioner United States has followed it in its brief. (e.g. Gov. Brief 5 n); and, since there is no dispute re-

SUMMARY OF ARGUMENT.

Both Part I and Part II of the Federal Power Act must be considered in determining whether jurisdiction may properly be exercised by the California Commission over the sales to the Navy. This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to *both* Part I and Part II. 343 U.S. at 419. Despite the disingenuous assertions of the Government in its brief here (Gov. Brief 16, 53) that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is

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specting the facts, it is doubted whether any harm can come from the loose practice in which the Government apparently wishes to indulge. We do resent the comment in the Government's brief (Gov. Brief 5 n) that the California Public Utilities Commission "has declined to forward it [the record of the joint hearing before the California Commission and the Federal Commission (see *supra*, pp. 6, 7)] to this Court." The California Commission has no power to forward such record, the only record before the California Supreme Court having been the decision of the California Commission. Had the Government wanted the record of the joint hearing forwarded to this Court, it could have taken appropriate steps and, certainly, the California Commission would not have objected.

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conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States" 28

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (R. 6-19) is reported at 50 Cal. P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is reported in 38 Adv. Cal. 323 (R. 68) and its order denying rehearing

is reported in 38 Adv. Cal. 484 (R. 74). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied a writ of review respecting the decision of the California Public Utilities Commission on January 21, 1952 (R. 68), and denied rehearing on February 18, 1952 (R. 74). The United States sought and obtained an order extending time for filing a petition for writ of certiorari to July 17, 1952 (order of Mr. Justice Douglas, dated April 17, 1952 (R. 75)). Petition for writ of certiorari was filed July 16, 1952 and was granted October 13, 1952 (R. 77). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED.

The ultimate question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, grant to California Electric Power Company permissive authority to charge certain rates in selling electricity to the Navy in California, the Navy taking delivery in California and transmitting the energy over its own lines to Nevada for the use of its Ammunition Depot in that state.

More specifically, the principal questions are:

Whether under Part II of the Federal Power Act the Federal Power Commission can claim jurisdiction

over the sales to the Navy even though that Commission's jurisdiction over sales is limited to interstate sales "to any person for resale" and the Navy is not a "person" as defined "for purposes of this act" in Section 3(4), and the Navy, furthermore, is not engaged in the business of reselling energy but on the contrary utilizes a portion of the energy it purchases from California Electric Power Company for the needs of its tenants, at a charge.

Whether state regulation of the sales to the Navy would fall within the doctrine of *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, so to preclude jurisdiction even where Congress has not acted, or on the contrary does not fall within that doctrine since Nevada has no regulatory jurisdiction over the charge made by the Navy to its tenants. If the latter, does not Part II preclude Federal Power Commission jurisdiction because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether if the conditions to state jurisdiction vouchsafed by Section 20 of Part I are met, that circumstance also precludes Federal Power Commission jurisdiction under Part II because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether under Part I the conditions to state jurisdiction contained in Section 20 are met, viz.,

that the states "directly concerned" have provided regulatory commissions with authority to enforce the requirements of Section 20, and such states have not been shown "unable to agree" through their properly constituted authorities.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) are set out in Appendix A, *infra,* pp. 41-49.

STATEMENT.

California Electric Power Company is engaged in the business of furnishing electric energy in certain eastern portions of California and also in two counties of Nevada (R. 7).

Since July 1, 1943 the Company has been selling energy to the Navy at Mill Creek, California, pursuant to a contract for the sale of all energy required by the Government "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada" (R. 10). The Company delivers the energy in California at the 55 kv station bus at its Mill Creek, California, generating plant. From there, the Navy transmits the energy over its own 55 kv transmission line, running partly through California and partly through

Nevada, to the Naval Ammunition Depot at Hawthorne, Nevada (R. 8).

A large percentage of the energy furnished the Navy is derived from Company hydroelectric projects located in California but operated under federal license under Part I of the Federal Power Act by virtue of location on public lands or on navigable streams (R. 11). At times, however, all or a portion of the energy comes from nonlicensed sources (R. 11).

The energy purchased by the Navy is consumed wholly at the Naval Ammunition Depot at Hawthorne, Nevada, which, in addition to the installations devoted directly to Naval use, includes the quarters for naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provide living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation (R. 11).

About 75 per cent of the energy purchased by the Navy is used in the Depot's industrial operations; the balance is used by the individuals and business establishments located on the Government reservation (R. 28, 50). Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege ceases upon termination of employment by the Navy.

For the business concessions, the Navy issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 50).

All of the Navy tenants aforementioned are charged for the energy they consume at 1.5 cents per kwh (R. 32), a figure set solely by the Navy and subject to change by the Navy from time to time (No. 495, this Term, Tr. of Record 291).

In October, 1947 California Electric Power Company applied to the California Commission for a general increase in electric rates throughout its system. Extensive hearings were conducted. Among other evidence, the revenues and expenses in connection with the sales to the Navy were considered (R. 8). On July 1, 1948 the California Commission issued its Decision No. 41798 (48 Cal. P.U.C. 183) authorizing rate increases spread equitably among the several classes of consumers in accordance with accepted practice (R. 8). It prescribed Schedule P-2 for customers of the same type and kind as the Navy, but it did not expressly name the Navy.

The question soon arose whether such rate decision should be construed to apply to sales to the Navy, and the Company filed a supplemental application with the California Commission seeking a determination on that point. In the midst of the hearings thereon, the Federal Power Commission issued an order to show cause against the Company upon the theory that it, not the California Commission, had jurisdiction over the sales to the Navy. By mutual

involved, a reading of the pertinent portions of the California Commission decision (R. 10-16) makes clear, and puts beyond any honest misunderstanding, that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

Specifically, the sales to the Navy are of energy derived partly from licensed sources. In addition, the Government argues that such sales are at wholesale in interstate commerce. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first, especially since the Government's brief follows that order.

Under Part II, the sales to the Navy are excluded from Federal Power Commission jurisdiction for four separate reasons:

(A) The sales are not to a "person." The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d). The Government admits that literally "person" as defined in the Act (Section 3(4)) does not include the Navy. To get around the difficulty, it argues at length that a literal construction would produce a result at odds with the purpose of Congress. However, far from being at

odds with the purpose and aim of Congress, the literal construction is entirely consistent. The Government's argument contains the fundamental weakness of assuming that tenants of the Navy are in the same position as members of the general public purchasing electricity from a private utility and that such tenants are in need of the same protection. Sensing such weakness, the Government shifts its ground to the proposition that it is the seller of power rather than the consumer which Congress aimed to protect and that surely Congress must have intended to give the Navy as much protection as it gave public utilities. (Gov. Brief 32.) However, the legislative history reveals that Congress was not concerned at all about the welfare of public utilities but only of ultimate consumers. Finally, the Government indulges in a specious legislative history argument designed to show that Congress did not know what it was doing when it used "person" in section 201(d). Such argument can readily be disposed of.

(B) The sales are not "for resale." The wholesale sales under Part II are defined as sales "for resale." The sales to the Navy are not "for resale" but rather for use of the Navy's Ammunition Depot. The portion of the energy not used in the industrial operations is provided to the Navy's tenants for a charge. That such furnishing of electricity to tenants is not "for resale" as Congress used such term is very apparent from the statutory history which reveals that Congress was aiming to protect members

of the general public purchasing from a utility, not tenants of a governmental agency who obviously are not in need of protection.

(C) The interstate commerce clause would not forbid California's exercise of jurisdiction over sales to the Navy because, unlike the situation in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), there would be no potential clash of state interests. Therefore, Part II, Section 201(a), declaring that Federal Power Commission regulation shall "extend only to those matters which are not subject to regulation by the States," operates to preclude Federal Power Commission jurisdiction. The Government sidesteps this embarrassing conclusion by declaring in a footnote (Gov. Brief 20n) that the argument is irrelevant where Congress has enacted a comprehensive scheme of regulation. The Government merely begs the question.

(D) Even if the sales to the Navy were held to fall within the principle of the *Attleboro* case and by virtue of the interstate commerce clause to be outside state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions set forth in Section 20 were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable

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(B) Even if California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State." Contrary to the Government's argument that Section 20 requires state commissions with compact powers, it is clear that Congress contemplated no more than a commission in each state with authority to fix just and reasonable rates "within such State." Both California and Nevada have such commissions.

(C) Even if California and Nevada are both states "directly concerned," they have not been shown unable to agree through their properly constituted authorities respecting the rates which the California Commission authorized California Electric Power Company to charge the Navy. To circumvent the effect of this admitted fact, the Government seeks to have read into Section 20 a requirement which is not there, viz., that the states must enter into affirmative agreements before they can claim jurisdiction, to the exclusion of the Federal Power Commission. Actually, Section 20 vouchsafes state jurisdiction so long as there is an absence of disagreement. Nevada upon the facts has not disagreed in any manner respecting the California Commission's authorization of rates for sales to the Navy.

The argument herein assumes that the sales in question are in interstate commerce because such assumption was made by the California Commission in reaching its decision. Furthermore, and for the same reasons, no reliance is placed on Section 201(f) of Part II. The brief of the second respondent, California Electric Power Company, deals with these matters.

ARGUMENT.

I. BOTH PART I AND PART II OF THE FEDERAL POWER ACT MUST BE CONSIDERED IN DETERMINING WHETHER JURISDICTION MAY PROPERLY BE EXERCISED BY THE CALIFORNIA COMMISSION OVER THE SALES TO THE NAVY.

This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission,* 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to both Part I and Part II. 343 U.S. at 419.

Even in the face of the *Pennsylvania Water* case, the Government continues to wage its argument of

repeal by implication. (Gov. Brief 54, 55.) Despite the clear statement that jurisdiction was given under Part I, Section 20, as well as under Part II, over the sales in question, viz., interstate sales for resale of licensed energy, the Government urges, "if the question should be reached in the present case[,] that Section 20 does not extend to interstate sales for resale and that, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act" (Gov. Brief 55n). We submit that the Government is unwarranted in treating this Court's statement respecting Part I as dictum. Furthermore, this Court has now made clear that the provisions of Part I must be accorded as much vitality as the provisions in Part II, even to the extent that seemingly overriding provisions of Part II will not be construed as "a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by Congress for the purpose of protecting the public domain." *Federal Power Commission v. Idaho Power Co.*, ... U.S. ....., 97 L. ed. (Advance p. 9, 13).

Contrary to the assertions of the Government that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is involved (Gov. Brief 16, 53), a reading of the pertinent portions of the California Commission's decision (R. 10-16) makes clear, and puts beyond any honest misunderstanding, that such decision was careful to assume that *both* Part I and Part II were relevant in deter-

mining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case. Curiously, it is the Government, not the California Commission, which is guilty of seeking to restrict inquiry to a single Part of the Federal Power Act.

The sales to the Navy are of energy derived partly from licensed sources. In addition, the Government argues that such sales are at wholesale in interstate commerce. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first, especially since the Government brief follows that order.

II. UNDER PART II THE SALES TO THE NAVY ARE EXCLUDED FROM FEDERAL POWER COMMISSION JURISDICTION FOR FOUR SEPARATE REASONS.

A. The sales are not to a "person."

The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d).

Even if it be conceded that the sales are "in interstate commerce" within the Act, they are not sales to a "person." At the very time the language of Section 201(d) was adopted, Congress also enacted in the same statute a new subsection defining the word "person." Part I, Section 3(4). The Government

admits that "person" as thus defined does not include the Navy. It proceeds to devote some twenty pages of its brief (Gov. Brief 28-47) to explain why it thinks "person" means something else in Section 201(d).

The Government does a number of things to escape the literal meaning of "person" as used in Section 201(d) and as defined in Section 3(4):

(1) Respecting the legislative history, it indulges in an intricate, ill-conceived argument, remarkable only for its ingeniousness (Gov. Brief 40, 41, 43). The Government elaborately argues that the section defining "person", Section 3(4), which appeared in the original bills before Congress in 1935 (S. 1725, H.R. 5423, 74th Cong., 1st Sess.) must not be construed to extend to Section 201(d) because the language of Section 201(d) as finally enacted and containing the word "person" did not appear in those original bills but, on the contrary, was inserted later on in the session and that, in any case, Congress, when it did insert the language containing the word "person" in Section 201(d), was not thinking about the definition of the word "person" found in Section 3(4) of the bill because it was only aiming "to close an obvious loophole in another aspect." Such reasoning not only imputes to Congress notable carelessness in draftsmanship but defies the canon of construction that "an omission at the time of enactment, whether careless or calculated, cannot be judicially supplied."[2]

[2]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 534.

We submit that the legislative history leaves no mistake that "person" as defined in Section 3(4) was meant by Congress to have the same meaning throughout the Act, including Section 201(d).[3] Not only had "person" not been defined at all in the Federal Water Power Act of 1920, but, when the word was defined for the first time in 1935, the Solicitor of the Federal Power Commission, one of the chief draftsmen for the new legislation, expressly stated, "We also used the word 'person' because in the drafting of the act, *and particularly in the new part of the act,* you could use the word 'person' with brevity and it made simplification for drafting" (emphasis added). *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423,* 74th Cong., 1st Sess. 460 (1935).

Furthermore, while the origial bill offered in the House (H.R. 5423, 74th Cong., 1st Sess.) contained language restricting the effect of the definition section, such restriction was left out in the final act. The original proposal was that Section 3 should start, "For the purposes of this Act, *unless the context otherwise requires* . . ." (emphasis added). When questioned about the situations where the context *would* otherwise require, the Solicitor for the Federal Power Commission said he would study the matter and report back. He subsequently reported that there

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[3]That the Government recognizes the dangerous ground on which it treads is manifested by its "caveat" (Gov. Brief 38, 39) that "We do not suggest that either the United States or municipalities are 'persons' or 'corporations' for all purposes under the Federal Power Act."

were no situations where the context would "otherwise require." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 459, 460, 485. The clause "unless the context otherwise requires" was significantly omitted from the Act as passed.

We recognize that the Government will be quick to apply to the above facts in the legislative history the same kind of intricate argument as that earlier alluded to and will contend that statements made by the Solicitor must not be given weight because "person" was inserted in Section 201(d) only toward the close of the session. Again, such argument would improperly impute to Congress reprehensible carelessness in draftsmanship.

(2) The Government next indulges in a policy argument designed to show that, regardless of the literal meaning of Section 201(d), Congress did not mean to exclude the sales to the Navy. (Gov. Brief 31-40). The Government very properly observes that a literal construction of a statute must give way if the result would be plainly at variance with the policy of the legislation as a whole. It develops this thesis with erudition and a wealth of citation.

We submit, however, that not only does the legislative history forbid "person" to be construed as one thing in Section 201(d) and something else in the rest of the Act, but that the aims and policies of Congress are fully carried out by giving "person" in Section 201(d) the meaning which Congress has declared it is to have "for purposes of this act" in Section 3(4).

The hearings before the respective committees of Congress, the reports of those committees and the words on the floor of Congress are replete with expresions of the aim of Congress to fill the gap in state regulation revealed in *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, and thereby to protect those members of the general public from excessive rates who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. E.g., *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 497 (1935); *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. 250 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess. 48, 49 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7, 8 (1935). Such purpose has been frequently noted by this Court. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610; *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 514-521; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 335-336.

Tenants of the Navy are not in the same position as members of the general public who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. The difference in position is very real. The Government attempts to obfuscate it by a hurried shift to the specious ground that Congress intended to protect public utilities and the Fed-

eral Government alike in selling to ultimate consumers. (Gov. Brief 32.) Certainly, Congress was not concerned with protecting public utilities when it enacted the Federal Power Act.

The vital difference between tenants of the Navy and those members of the public whom Congress *did* intend to protect is that Navy tenants are not in need of protection. There is a close similarity of interest between the Navy and its tenants. The Navy itself is in an entirely different category from a public utility engaged in the business of selling to ultimate consumers. Unlike public utilities which might be willing, and, indeed, have shown themselves willing in the past, to purchase wholesale power in interstate commerce at exorbitant costs so long as they could pass such costs on to ultimate consumers, the Navy has the public duty of entering into electric purchase contracts only if they are consistent with its obligations as a branch of the military service and of the Government. It may be presumed that the Navy can take care of itself in that regard without the help of another federal agency. Furthermore, the Navy in providing service to its tenants is not engaged in a business for profit. It follows that in the case of tenants of the Navy the very factors are absent which motivated the Congressional policy given expression in the Federal Power Act.

Admittedly, as the Government points out, the committee reports of Congress (Sen. Rep. No. 621, H.R. Rep. No. 1318, H.R. Rep. No. 1903, 74th Cong., 1st

Sess.) speak in general terms about wholesale sales in interstate commerce without reference to the identity of the purchaser, as being the sales meant to be covered by Part II, but surely the Government would have to agree that such general language must be understood in its context which expressly dealt with the *Attleboro* situation, to repeat, a situation where protection is needed for members of the general public who are ultimate consumers purchasing electricity from a public utility[4] which, in turn, purchases the energy at wholesale in interstate commerce. The transcripts of Congressional committee hearings, the reports of those committees and the record of the comments on the floor of Congress in 1935 in connection with the Federal Power Act can all be searched in vain for any reference to the kind of sales here in issue. Clearly, the instant case is, as the Government puts it, a situation unforeseen. Therefore, the Government is not entitled to rely upon the broad language in committee reports as proving that Congress meant to cover a situation to which it had given no thought.

Finally, it should be noted that, while the Government has had success before three federal courts in its position that the identity of the purchaser of wholesale power is immaterial (*California Electric*

[4]Even private individuals or organizations in providing electric service to their tenants have by the great weight of authority been held to be not engaged in the business of public utility service. E. g., *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057 (1921); *Jonas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, PUR 1928D 825 (1928); *In Re Fulton*, PUR 1930D 11 (Mo. 1930).

Power Co. v. Federal Power Commission, 9th Cir., No. 12987 (1952); *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F. 2d 472 (7th Cir.); *Wisconsin, et al. v. Federal Power Commission* and *Wisconsin Power and Light Co. v. Federal Power Commission*, D.C. Cir. Nos. 11224, 11225), no consideration was given by those courts to the fact that, while there is need for protection in the case of an ultimate consumer who buys from a public utility, there is no such need in the case of an ultimate consumer who is a tenant of the Navy and is furnished electric service by the Navy. The policy of Congress as manifested in the Federal Power Act obviously does not extend to this latter situation.

B. The sales are not "for resale."

The wholesale sales covered by Part II are defined as sales "for resale." Section 201(d). The sales to the Navy are not "for resale" in the sense in which that term is used in Part II.

The sales are "for use of the Government's Naval Ammunition Depot." All of the energy is used in fact on such Depot. The greater part of it is used in the Depot's industrial operations. The balance is furnished only to tenants at sufferance at the Depot, tenants whose presence is permitted only so long as the Navy needs them.

While it is true that the tenants are charged so much per kilowatt hour for actual use, this is a legitimate occasion for the operation of that principle of statutory construction for which the Government

eloquently contends elsewhere, viz., that the literal meaning of words must be tempered by consideration of the policies and aims of the statute. Again, it is only necessary to refer to the historical fact that in enacting Part II Congress sought to deal with the *Attleboro* situation where one utility sells to another utility for resale by the latter to ultimate consumers, to conclude that Congress in using the phrase "for resale" meant it to apply only under similar circumstances. Clearly, Congress was aiming at the situation where the reseller is engaged in public utility service and the ultimate consumers are in need of protection, not to the situation where the reseller is merely providing service to its tenants. Again, it must be noted that there is a similarity of interest between the Navy and its tenants and consequently an absence of that need for protection which moved Congress to enact Part II.

In this phase of its argument the Government again seeks to derive comfort from general statements in the cases and Congressional reports describing the gap in the *Attleboro* case, as supporting its claim that the identity of the reseller is immaterial. (Gov. Brief 48-51.) The Government must recognize, however, that such general statements to be properly understood must be related to their context.

C. The interstate commerce clause would not forbid California's exercise of jurisdiction over the sales to the Navy. Therefore, Part II, Section 201(a), declaring that Federal Power Commission regulation shall "extend only to those matters which are not subject to regulation by the States," operates to preclude Federal Power Commission jurisdiction.

If it be assumed that the sales to the Navy are in interstate commerce, regulation of such sales by California would, nevertheless, not be precluded under the holding of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). That decision was based upon the proposition that the interstate commerce clause forbids state jurisdiction where a potential clash of state interests would arise from its exercise. It was there held that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free. In the case of the sales to the Navy, there can be no potential clash of state interests. Nevada has no jurisdiction, nor could it have, over the Navy, either as to the rates the Navy pays to California Electric Power Company or as to the rates the Navy charges its tenants. Therefore, Nevada cannot be said to have a state interest respecting the sales in question which could potentially clash with the interests of California. The principle of *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920), while not involving

sales for resale, is applicable. There, a Pennsylvania company transmitted gas from Pennsylvania into New York and sold it directly to New York consumers. Such sales, even though in interstate commerce, were held to be local in character because no potential clash of state interests was involved and, therefore, subject to state control in the absence of supervening Congressional action.

If the foregoing interpretation is correct that the interstate commerce clause does not of itself forbid exercise by California of jurisdiction over the sales to the Navy, it follows that the language of Section 201(a) operates to preclude Federal Power Commission jurisdiction, for the words "extend only to those matters which are not subject to regulation by the States" were avowedly inserted in that section to guarantee that whatever jurisdiction states had over sales of electric energy prior to the enactment of the Federal Power Act would not be taken away. Sen. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935). As Dozier A. DeVane, Solicitor for the Federal Power Commission, put it in hearings before the Senate Committee on Interstate Commerce (*Hearings before Committee on Interstate Commerce on S. 1725,* 74th Cong., 1st Sess. 247), "It cannot be too strongly emphasized that the rate-making power conferred upon the [Federal] Commission . . . is limited to the field in which the States have no constitutional authority."

D. Even if the sales to the Navy were held to fall within the principle of the Attleboro case and by virtue of the interstate commerce clause to be outside state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

This conclusion in the first place follows the natural meaning of the phrase "extend only to those matters which *are not subject to regulation by the States.*" (Sec. 201(a). Emphasis added.) The phrase contains no limitation. It says that, whenever the states have jurisdiction, regardless of the source of that jurisdiction, authority is withheld from the Federal Power Commission. The states may have jurisdiction because the interstate commerce clause does not forbid it. We have already pointed out in Item C. above that we believe that to be the correct interpretation of the interstate commerce clause as applied to the sales to the Navy. Or the states may have jurisdiction because, while falling under the ban of the interstate commerce clause, Congress has, nevertheless, conferred jurisdiction upon them, as it has power to do. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761

(1944). That is precisely what Congress has done in Section 20 of Part I where interstate sales of power by a licensee are involved and the conditions to state jurisdiction set forth in that section are met.

Such literal construction of the phrase "extend only to those matters which are not subject to regulation by the States" is wholly in keeping with the legislative history and the aim of Congress. The committee hearings, the committee reports and the words on the floor of Congress pertaining to Part II are all replete with statements that Part II was designed to fill the gap in regulation revealed by the *Attleboro* decision, *but to do no more,* ensuring to the states whatever authority they were already able to exercise, regardless of the source of that authority. The phrase in question was used with the express purpose of guaranteeing to the states *all* of their previously possessed authority, even that given them by the Federal Water Power Act of 1920 which was incorporated as Part I of the Federal Power Act. It is often forgotten that the Federal Water Power Act of 1920 was in effect when the *Attleboro* decision came down in 1927 but was not involved in that case because the energy in question came from non-licensed sources. Surely, no one can doubt that, if licensed power had been involved, the sales would have been "subject to regulation by the States" assuming the conditions of Section 20 could be met.

The foregoing construction of the phrase "extend only to those matters which are not subject to regu-

to the Federal Power Commission. 179 F. 2d 179; 189-193.

We submit that, had Congress, when it first used the language of Section 20 in the Federal Water Power Act of 1920, meant to encompass within its terms only state regulatory bodies having compact powers, it would have done so in direct terms. The unusual grant of compact authority is not lightly to be presumed as having been conferred by indirection, especially since the policy of Congress expressed in Section 20 can be effectuated without any such interpolation. The policy was to ensure that "the rates . . . and the services . . . by any licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable."[5] The state where the licensed power is first sold can ensure the reasonableness of the rate by having a commission with authority to fix the wholesale rate. California has admitted power not only over retail but wholesale rates of utilities operating within the state.[6] The state where the licensed power is ulti-

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[5]The Government has deliberately omitted from its Appendix A quotation of Section 20 (Gov. Brief 75) the pertinent language: "or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service."

[6]California Public Utilities Code (Cal. Stats. 1951, ch. 764) provides in Section 216(a): "When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

mately consumed can ensure the reasonableness of "the rates . . . by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service" if it provides a commission with authority to fix such rates[7] and if it is given the indirect control over the wholesale rate vouchsafed by Section 20, viz., the power to have jurisdiction over that rate automatically transferred to the Federal Power Commission merely by stating its disagreement with such rate. That was in fact the manner by which Federal Power Commission jurisdiction was obtained in the *Second Safe Harbor Case*, and no one can deny that the consumers in Maryland, the state of ultimate consumption, were thereby protected.

C. Even if California and Nevada are assumed both to be states directly concerned, they have not been shown "unable to agree through their properly constituted authorities" respecting the rates which the California Commission authorized California Electric Power Company to charge the Navy.

The Government no doubt concedes that this is true upon the facts. Therefore, it reads into Section 20 a requirement that states directly concerned must affirmatively agree upon a given rate in order to obtain jurisdiction over interstate sales by licensees. (Gov. Brief 62.) However, as we have already shown, Sec-

[7]The Nevada Public Service Commission has jurisdiction over the rates for sale to ultimate consumers in Nevada. Hillyer's Complied Nevada Laws, 1929, Section 6116. The Government points out that the Nevada Public Service Commission has no authority over wholesalers of electric power in Nevada (Gov. Brief 59n), but that circumstance is immaterial upon the facts, the wholesale sales, if they be so considered, having occurred not in Nevada but in California.

tion 20 does not envisage state commissions with compact powers, nor any complicated machinery before Federal Power Commission jurisdiction may be invoked. The section envisages state commissions of the usual kind with local, not extraterritorial powers, and a mere inability by the state of consumption to agree with the wholesale rate imposed by the other state is sufficient to invoke Federal Power Commission jurisdiction. As already noted, Federal Power Commission jurisdiction was invoked by this simple means in the *Second Safe Harbor Case*. No complicated compact machinery was contemplated by Congress, nor was any needed to effectuate its policy.

CONCLUSION.

The foregoing analysis clearly demonstrates that in the instant case neither Part I nor Part II conferred jurisdiction upon the Federal Power Commission. Such analysis further demonstrates that the California Commission is not precluded from exercising jurisdiction either by the interstate commerce clause or Part II, and that Part I did authorize the California Commission to exercise jurisdiction.

This is a case where the eloquent admonition of Mr. Justice Frankfurter is particularly applicable:

> "The underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of

legislation. The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that restrospective expansion of meaning which properly deserves the stigma of judicial legislation."[8]

It is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be affirmed.

Dated, San Francisco, California,
January 2, 1953.

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
Attorneys for Respondent Public Utilities Commission of the State of California.

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[8]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 540.

(Appendix A Follows.)

Appendix A

Appendix A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a. *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates

lation by the States" has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances. The problem of jurisdiction in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), happened to be easy because Part I and Part II taken separately both produced the same result that jurisdiction vested in the federal agency. But, suppose the states had *not* been shown "unable to agree." Then Part I, Section 20, standing alone would have operated to vest jurisdiction in the states and Part II standing alone and without reference to the language in Section 201(a) would have operated to vest jurisdiction in the Federal Power Commission. However, by giving Section 201(a) the vitality which Congress meant it to have, the conflict is resolved. The sales would be "subject to regulation by the States" because of Part I, Section 20; therefore, Section 201(a) would operate to deny jurisdiction to the Federal Power Commission under Part II.

Upon the facts in the instant case, the conditions to state jurisdiction set forth in Part I, Section 20, are in fact met, as shown in the following section of this brief.

Before leaving the discussion of Part II, it should be noted that, even if all of the four reasons set forth above for denying Federal Power Commission jurisdiction were rejected, the Federal Power Commission still could not obtain jurisdiction under Part II over the entire purchases by the Navy. The energy sold

to the tenants is only a portion of the energy purchased, and a portion which can be readily calculated inasmuch as each Navy tenant is separately metered (R. 32). The jurisdiction of the Federal Power Commission, therefore, under the principle of *Colorado Interstate Gas. Co. v. Federal Power Commission*, 185 F. 2d 357 (3d Cir., 1950) would extend only to the portion of the energy furnished such tenants. The situation is clearly different from that in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U. S. 414 (1952) because there the "jurisdictional" part of the sales was not distinguishable from the "nonjurisdictional" part.

III. UNDER PART I, DEALING WITH SALES OF ENERGY BY LICENSEES OF FEDERAL POWER PROJECTS, THE CALIFORNIA COMMISSION HAS JURISDICTION OVER THE SALES TO THE NAVY BECAUSE ALL OF THE CONDITIONS TO STATE JURISDICTION SET FORTH IN SECTION 20 ARE MET.

Assuming that the sales to the Navy are in interstate commerce, then, under Section 20, Congress has conferred jurisdiction upon the Federal Power Commission only if: (a) "any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section [20] within such State" and (b) even though the requisite state commissions or other authorities have been provided, only if the states "directly concerned" are "unable to agree" on the service or rates through their properly constituted authorities.

A. California is the only state "directly concerned."

The Government would concede that California is "directly concerned" because the Company operates as a public utility in California and consummates the sales to the Navy in California. The effect of the revenues and expenses in connection with the sales by the Company to the Navy has a direct influence upon the rates which the California Commission may authorize the Company to charge for intrastate wholesale and retail sales to consumers within California. California's direct concern does not, of course, arise by virtue of any effect which the regulation of rates of the Company might have upon the Navy or upon the Navy's tenants. California has no regulatory power over the Navy or its tenants, either within or outside California, for as the Government points out (Gov. Brief p. 57), the doctrine of intergovernmental immunity applies.

Nevada, on the contrary, is not "directly concerned." Since as the Government puts it, the doctrine of intergovernmental immunity applies with an even hand, Nevada has no regulatory power over the Navy or its tenants, either within or outside Nevada. Thus the fact that the energy is consumed within a Naval reservation in Nevada gives Nevada no more concern than such circumstance would give to Maine or Florida, obviously not a "direct concern." Furthermore, there is no basis for "direct concern" to Nevada over the sales in question corresponding to that by which California derives its "direct concern." The Government argues (Gov. Brief 57, 58)

that Nevada is "directly concerned" because the Company *does* make some sales of electric energy in Nevada and, therefore, the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada because of the over-all effect upon the rates to Nevada consumers. That argument, however, ignores the fact that Nevada may regulate the rates to Nevada consumers solely by reference to the Company's Nevada rather than its company-wide operations, the determination of a reasonable return being based solely upon that part of the Company's property devoted to public use for Nevada and upon the expenses and revenues allocable to Nevada. The revenues and expenses in connection with the sales to the Navy are thus excluded and give Nevada no "direct concern."

It follows that Section 20 contemplates the situation where the direct concern of one state arises from consummation of particular sales of licensed energy in that state and the direct concern of the other state arises from *jurisdiction over the rate charged the ultimate consumer of the energy derived from such sales.* This construction is further given support from the use of the words "within such State" in the phrase "whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section *within such State.*" (Emphasis added.)

Since California is the only state "directly concerned," no further inquiry need be made respecting the requirements of Section 20 to ensure California's jurisdiction, because California has provided a com-

mission with authority to enforce the requirements of the section, i.e., as we shall demonstrate, a commission with authority over the rates of utilities "within such State." No question of inability of California and Nevada to agree on the rate prescribed by California for the sales by the Company to the Navy can arise.

B. Even if California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State."

The California Public Utilities Commission is vested by the California Constitution, article XII, section 23, and by the Public Utilities Act (Public Utilities Code, Sections 451, 453, 454, (Cal. Stats. 1951, ch. 764)) with broad regulatory powers over the rates of public utility electric companies operating within the state.

Similarly, the Nevada Public Service Commission is vested with authority to regulate the rates of public utility electric companies providing service to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Sections 6100-6140.

We submit that such state commission regulatory control is all that Section 20 contemplates when it speaks of "a commission or other authority to enforce the requirements of this section within such State." The context reveals that the "requirements of this section" are that "the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee

for sale and distribution or use in public service shall be reasonable . . . to the customer." The section contemplates state commissions of the usual kind with authority to fix rates within their own respective states. This is evident from the quoted language which contemplates that one state shall have regulatory power over the licensee and the other state regulatory power over the purchaser from the licensee. It is further evident from use of the phrase "the requirements of this section within such state."

To counter the foregoing conclusion, the Government simply reads into Section 20 what is not there. It declares that to qualify under Section 20 a state commission must have affirmative power to agree on a rate fixed in another state. (Gov. Brief 58-62.) It refers to the *First* and *Second Safe Harbor Cases (Safe Harbor W.P. Corp. v. Federal Power Commission,* 124 F. 2d 800 (3d Cir.), certiorari denied, 316 U.S. 663; *Safe Harbor W.P. Corp. v. Federal Power Commission,* 179 F. 2d 179 (3d Cir.), ceriorari denied, 339 U.S. 957) which did in fact involve state commissions with power to enter into agreements with other state commissions. While it is true that in the *Second Safe Harbor Case* the court indicated a belief that Section 20 contemplated state commissions with compact powers, the fact remains that no affirmative action between the two state commissions took place and yet the court declared they had been shown "unable to agree" under the terms of Section 20, by virtue of certain correspondence by one of the commissions, directed not to the other commission but

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
Attorneys for Respondent Public Utilities Commission of the State of California.
514 State Building.

and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and

distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interest commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy

at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any

one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service,

or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition

which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

* * * * * * *

SEC. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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Jurisdiction

The Order of the California Supreme Court denying a writ of review was entered on January 21, 1952 (R. 38). An Order denying petition for rehearing was entered on February 18, 1952 (R. 46). By order of Justice Douglas, dated May 1, 1952, time for filing a petition for writ of certiorari was extended to July 17, 1952 (R. 47). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), on the ground that the decision denied a title, right privilege or immunity specifically set up and claimed by the County of Mineral under the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791 *et seq.*

The cases relied upon to sustain the jurisdiction of this Court are *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U. S. 366, 371-373; *Madera Sugar Pine Company* v. *Industrial Accident Commission of the State of California*, 262 U. S. 499, 500; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380; *Calderola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 183-184; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367.

The California Commission ruled that it held exclusive jurisdiction. The County raised the same issue in Petition for review and Petition for rehearing. The California Supreme Court sustained the California Commission.[2] The questions presented are substantial as is more fully developed under the reasons for granting the writ (*infra*, pp. 6-8).

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[2] The denial by the California Supreme Court of the County's petition for a writ of review, without written opinion, "was necessarily a final judicial determination" as recognized by this Court in *Napa Valley Electric Co.* v. *Railroad Commission of the State of California*, 251 U. S. 366 at 373, and "the absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented . . .".

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Statement

At the argument before this Court in this cause on January 14, 1953, counsel for the California Commission pointed out that its brief as well as the briefs of the California Electric Power Company and of the United States failed to present legislative history material respecting

Questions Presented

The over-all question is whether the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, over the sales of electric energy in California by the California Electric Power Company to the County of Mineral, delivery of which is taken by the County in California and by it transmitted on its own lines to its substation at Hawthorne, Nevada, for resale to Mineral County inhabitants.

Specifically the questions are:

1. Whether the interstate sale to the County is a "sale of electric energy to any person for resale" subject to Federal, rather than state regulations, under Sections 201(d) and 205 of Part II of the Federal Power Act.

2. Whether the Nevada Public Service Commission is a "properly constituted" authority to enter into a rate agreement with the California Public Utilities Commission within the meaning of Section 20 of Part I of the Act so as to preclude Federal Power Commission Jurisdiction.

Statutory Provisions Involved

Sections 3(3), 3(4), 20, and 201, of the Federal Power Act are involved as well as Section 2 of Nevada Statutes 1925 and Nev. Comp. L. (1929) Secs. 6106 and 6149. Pertinent provisions of these acts are set forth in the appendix, *infra*, pp. 10-15.

Statement

Mineral County's case here is a companion case to that of the United States of America vs. the same respondents. These causes have been heard and briefed together before the Federal Power Commission as well as before the California Commission. The Federal Power Commission held that it had exclusive jurisdiction over these sales, and its order asserting this jurisdiction is presently pending for

Section 20, Part I of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791a, *et seq.*). It was stated that the reason for the deficiency in the California Commission's brief arose from inability after the efforts of some four months to obtain, either directly or through inter-library arrangements, the pertinent legislative documents. It was further stated that counsel had been given access to such documents in the library of this Court four days before the argument.* Mr. Chief Justice Vinson inquired whether it was desired to supplement the California Commission's brief with a presentation of references to such material. Counsel replied it would be grateful for that opportunity. Permission was granted. The following references and material are respectfully submitted.

History of Pertinent Language in Section 20, Federal Power Act

The language in Section 20 as it exists today is:

> ". . . and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State . . . . or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, . . . jurisdiction is hereby conferred upon the [Federal Power] Commission . . . ."

This identical language was first enacted in 1920 in the Federal Water Power Act of 1920, 41 Stat. 1063, Section 20. However, such identical language was first used three years earlier in a House bill substituting for S. 1419, 65th Cong., 2d Sess. (1917), which in turn had its genesis in an amend-

* The staff of the Supreme Court's Library was not only courteous but solicitous about procuring the material requested.

ment to S. 3331, 64th Cong., 1st Sess. (1916) proposed by La Follette on February 17, 1916. There is set forth herewith in chronological sequence the development of the language from 1916 to 1920.

S. 3331, 64th Cong., 1st Sess. (1916) contained the following language:

> "Section 7 . . . *Provided*, That where said power or any part of it shall enter into interstate or foreign commerce, the rates, charges, and service made and rendered, shall be reasonable, nondiscriminatory, and adequate to the public; and jurisdiction is hereby conferred upon and vested in the Interstate Commerce Commission to enforce this provision, upon the complaint of any person aggrieved, in the manner and according to the procedure and practice of that commission in fixing and regulating the rates and charges of railway companies . . ."

The language in this form was the subject of Sen. Rep. 89, 64th Cong., 1st Sess. (1916).

It will be noted that the language in S. 3331 vested jurisdiction over the rates of licensees exclusively in a federal commission whenever the power entered into interstate commerce. La Follette, however, on February 17, 1916, proposed an amendment, substituting for the language above quoted the following:

> "And in the event that any State shall not have provided a commission or other authority for the regulation and control of such charges, rates, and services, such regulation within such State shall be made and enforced by the Interstate Commerce Commission . . ."

This language was modified and reported to the Senate on March 3, 1916, to read as follows:

> ". . . and whenever the States directly concerned are unable to agree, through the properly constituted

authorities thereof, on either rates, charges, or services jurisdiction is hereby conferred upon and vested in the Interstate Commerce Commission to enforce this provision concerning the power that enters into interstate commerce . . . ."

S. 3331 was reported to the House which reverted to the earlier language giving exclusive jurisdiction in the Interstate Commerce Commission. The House referred the bill to its Committee on Interstate and Foreign Commerce in this form. The bill was subsequently modified again by striking Section 7 altogether and providing for jurisdiction over interstate sales by licensees to vest in the Secretary of War or "such body as may be provided by Federal statute." The bill in such form was the subject of H. R. Rep. No. 404, 64th Cong., 1st Sess. (March 21, 1916).

Nothing came of S. 3331 except that it became the model for S. 1419, 65th Cong., 2d Sess. (1917), introduced by Senator Shields on April 9, 1917, the same language being used in Section 7 as that previously adopted by the Senate in S. 3331. In such form S. 1419 was sent to the House on December 14, 1917. At the instigation of President Wilson a special Water Power Committee was formed in the House at that time. The Committee reported a substitute bill and in place of Section 7, substituted a Section 20 with language identical for the first time with that subsequently enacted in the Federal Water Power Act of 1920 (41 Stat. 1063) (now contained in the present Section 20 of Part I of the Federal Power Act). Extensive hearings were conducted on the substitute bill. *Hearings before House Committee on Water Power on S. 1419*, 65th Cong., 2d Sess., March 18-May 27, 1918. Since the testimony at such hearings related to the specific language contained today in Section 20, it is the most useful guide, aside from the language itself, to its meaning.

Before referring to particular parts of the testimony at such hearings, it should be noted that upon the strength of such testimony, the House issued H. R. Rep. No. 715, 65th Cong., 2d Sess. on June 28, 1918, and that subsequently a Conference Report, on S. 1419, 65th Cong., 3d Sess. was issued, which appears in the Congressional Record, 65th Cong., 3d Sess. 4630 *et seq.* Section 20 remained unchanged. The references to the reports, in the 66th Congress during which Section 20 was finally adopted are as follows: H. R. Rep. No. 61, 66th Cong., 1st Sess. (June 24, 1919) respecting H. R. 3184; Sen. Rep. No. 180, 66th Cong., 1st Sess. (September 12, 1919) respecting H. R. 3184; Sen. Rep. No. 269 and H. R. Rep. No. 910, 66th Cong., 2d Sess. (April 30, 1920) both of which constitute a conference report on H. R. 3184.

An examination of all the documents referred to indicates that none of the Congressional reports listed sheds any light on the meaning of Section 20 but that the testimony of hearings before the House Water Power Committee in 1919 as noted above, when the identical pertinent language of Section 20 was first being considered, proves most helpful. The page references in the following are to pages in the testimony in *Hearings before House Committee on Water Power on S. 1419*, 65th Cong., 2d Sess. March 18-May 27, 1918:

> Page 64, "Mr. Candler [speaking of Section 20]: Under your bill you leave it in the hands of the local authorities unless a dispute arises, and when a dispute does arise this [federal] commission acts as an arbitrator between them?
>
> "[Page 65] Mr. Merrill [spokesman for the draftsmen] Yes; on the theory that these are matters of local concern. . . .

It is assumed that if the States have provided themselves with full authority to act that there the Federal Commission shall not interfere.

"Mr. Lever. Shall not interfere even though they do not act?

"Mr. Merrill, *Even though they do not act,* provided they have power to act, and have established a commission or other similar authority for such purpose." (Italics added.)

Page 97. "Mr. Doremus. Is it your best judgment, and the judgment of those who prepared this bill, that the regulation of rates and charges and service as to interstate business should be left with the local authorities, the various State commissions?

"Mr. Merrill. *If they do it; and they are doing it now. . . . I know that the Nevada commission, for instance, is fixing the rates in Nevada for power which is delivered from plants operating in California;* I do not know whether the question has even come before the courts as to whether such business is or is not interstate commerce, within the meaning of the commerce clause of the Constitution, so that exclusive jurisdiction would be vested in the Federal Government, if it wished to exercise it. (Italics added.)

"Mr. Doremus. It might be a power which Congress could exercise, or, if it failed to exercise it, could be left in the jurisdiction of the State.

"Mr. Merrill. It is my judgment that so long as it is satisfactorily handled by the several States it had better be left with them."

Before concluding, it may perhaps not be amiss to state in writing what was said by counsel for the California Commission at the argument, viz., that an examination of the statutes of all of the forty-eight states reveals that at the time Section 20 was first enacted, and prior thereto, no state commission was vested with authority to enter

into compacts or affirmative agreements of any kind with the commission of any other state.

Respectfully submitted,

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
Attorneys for Respondent
Public Utilities Commission
of the State of California.

Dated, Washington, D. C.
January 15, 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA,
A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

J. F. BLAISDELL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

The County of Mineral prays that a writ of certiorari issue to review the order of the Supreme Court of California, entered on January 21, 1952, in the above entitled case denying petition for a writ of review of an Order of the California Public Utilities Commission entered on July 3, 1951.

Opinions Below

The denial of the petition for the Writ by the California Supreme Court was without an opinion, and the opinion of the California Public Utilities Commission [1] is reported at 50 California Public Utilities Commission 749.

[1] In addition to its own record, Mineral County will refer to the more complete record in the related case of *United States* v. *The Public Utility Commission of the State of California*, No. 205 this term. These references will be indicated as (Govt. R. —).

review in the United States Court of Appeals for the Ninth Circuit. As intervenors, both the United States and the County have filed briefs in that Court.[3]

The California Electric Power Company sells and delivers electric energy at its Mill Creek Plant in Mono County, California, to Mineral County, admittedly a public utility, functioning as the Mineral County Power System, which transmits such energy over its own line for resale to the public in said County. Part of the energy comes from licensed projects, part from nonlicensed sources and in varying percentages.

For more than 13 years (Govt. R. 26) electric energy has been sold to the County by the Company and its corporate predecessor. On October 15, 1948 the Company submitted for filing with the Federal Commission a proposed rate applicable to Mineral County, representing a 43 percent increase (Govt. R. 27), but did not complete the filing (Govt. R. 27). The Company proceeded to bill the County at an increased rate and on March 22, 1949, declared in a letter to the Federal Commission that the Company had decided not to go ahead with the filings (Govt. R. 27). The County protested the higher rates and the absence of filing with the Federal Commission and a public hearing was held in San Francisco March 20-21, 1950, pursuant to a Federal Commission Order to Show Cause. These hearings were before Hearing Examiners for both the Federal Commission and the California Commission and appearances were entered for the California Commission, the Company, the County, and for the Navy.

On April 13, 1951, the Federal Commission issued Opinion No. 212 (Govt. R. 35) ruling jurisdiction to rest with

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[3] Oral argument in this case is set for August 4, 1952 and the California Commission has filed Amicus Curiae briefs therein.

the Federal Commission under both Parts I and II of the Federal Power Act, and making certain orders. Applications for rehearing were filed with the Federal Commission by both the California Company and the California Commission which were denied on June 5, 1951. On June 21, 1951, the Company filed a Petition for Review in the United States Court of Appeals for the Ninth Circuit, No. 12987, being the case of *California Electric Power Company* v. *Federal Power Commission*.

On July 3, 1951, the California Commission issued its own decision No. 45913, 50 California Public Utilities Commission 749 (Govt. R. 19) ruling that jurisdiction rests with the California Commission to the exclusion of the Federal Commission, with respect to the sales of electric energy both to the Navy (government) and the Mineral County Power System (County).

The Government and the County filed timely petitions for rehearing (R. 2, 8) which were denied and under date of August 28, 1951, the County filed a petition for writ of review with the Supreme Court of California (R. 8).[4] The said petition was denied on January 21, 1952, without an opinion, Gibson, C. J., Carter, J., and Spence, J., voting for issuance of the writ (R. 38). Thereafter and under date of February 1, 1952, the County petitioned for rehearing of the denial of petition for writ of review (R. 40) which was denied on February 18, 1952, without opinion. Thus, the Federal Commission and the California Commission, on the identical record, arrived at diametrically opposite decisions.

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[4] In paragraph IV of its petition for a writ of review (R. 1), the county incorrectly referred to a "first supplemental application." This should have been designated "*Second* supplemental application." In paragraph V the County incorrectly used the word "authorizing" instead of "directed."

Specification of Errors to Be Urged

The Supreme Court of the State of California erred:

In affirming the decision of the California Commission, by denying the County's petition for a writ of review and its petition for rehearing and in the following respects:

1. In holding that the Company's sale of electric energy for resale to Mineral County was not "sale to any person for resale" subject to regulation of the Federal Commission under Section 201 (d) of The Power Act, since the definition of "person" in Section 3(3), (4) excludes municipalities.

2. In holding that since the energy sold to Mineral County is at times generated at hydro-electric projects licensed under Part I of The Federal Power Act, the Company's sale to Mineral County is not subject to Federal Commission regulation under Part II.

3. In holding that jurisdiction rests with the California Commission under Section 20, Part I of the Act to the exclusion of the Federal Power Commission on a finding that "(1) each of the states directly concerned, viz., California and Nevada, has provided 'a commission or other authority to enforce the requirements of this Section (Section 20, Part I) within such state', and (2) such states have not, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question."

Reasons for Granting the Writ

1. The California Commission's holding that a municipality is not a "person" under Section 201 (d) because of the definition in Section 3(3), (4) of the Act is in square conflict with the recent case of Wisconsin-Michigan Power Co. v. Federal Power Commission, decided on June 9, 1952, by the United States Court of Appeals for the Seventh

Circuit. In that case, which involved the identical situation of a sale for resale to a municipality, the Seventh Circuit after consideration of the Act's legislative history and purpose, concluded that such sales for resales were subject to federal regulation under Part II. In so holding the Court commented that the "apparent inconsistency was an oversight," "the 'slip' was inadvertent" and the congressional intent was "not so to limit the word 'person' as to exclude any one selling electric energy for resale" (slip opinion, pp. 11, 12). Moreover, the Court states directly: "We see no escape from the postulate that sales made by the power company to distributors for resale are subject only to federal regulation." (Slip opinion, P. 7.)

2. The California Commission ruling that the wholesale interstate rates of a licensee are not subject to regulation under Part II of the Act because of Section 201 (a) and (b), and Section 20, of Part I has been rejected as unsound by this Court in Pennsylvania Water Company vs. Federal Power Commission, 343 U.S. 414.[5] In that case Penn Water argued that "since it is subject to regulation under Part I as a licensee, it cannot be regulated under Part II as a public utility." The Court disagreed and stated that "with some express exceptions not here relevant, the language of Part II of the Act makes all 'public utilities' subject to the regulation it prescribed." And further: "Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. * * * It would hinder, not help, the Power Act's program if we

[5] The California Commission ruled that the sales to the County were subject to state regulation under Part I and that, since Section 201 (a) declared that federal regulation shall "extend only to those matters which are not subject to regulation by the states," the provisions of Part II do not apply. This Court ruled that "* * * the language of Part II of the Act makes 'public utility' subject to the regulation it prescribes."

should impliedly exempt Part I licensees from the more expansive Part II regulation."

3. The California Commission ruling that it had jurisdiction under Section 20 of Part I is also erroneous since the state of Nevada has not provided a commission or other authority to enforce the requirements of Section 20, Part I. Nevada Statutes, 1925, P. 55, Section 21, Nev. Comp. L. (1929) Secs. 6106 and 6149. (Appendix, *infra*, p. 13). Moreover, not only must the state provide a commission or other properly constituted authority, but that authority must in fact exercise the delegated powers. *Safe Harbor Water Power Corp. vs. Federal Power Commission,* 124 Federal 805-806, *Safe Harbor Water Power Corp. vs. Federal Power Commission,* 179 Federal 179, certiorari denied, 339 U.S. 957. That the Nevada Public Service Commission made no attempt to exercise any powers in this matter is evidenced by the statement of the Chairman at the concurrent hearing of the two Commissions. (R. 24.)

Conclusion

The result of the California Commission's assertion of jurisdiction in this case is to leave Mineral County (and its customers) with the dubious protection of rate regulation by a commission of another State, whose primary concern is the welfare of its own citizens. The County believes that the Federal Power Act was not intended to achieve such a result, but rather to bestow the benefits of national federal regulation upon the County. Moreover, we have shown that the California Commission's ruling conflicts squarely on issues of substantial public importance with this Court's *Penn Water* decision and with the Seventh Circuit's *Wisconsin-Michigan* decision as well as with the

Federal Commission's own ruling in this very situation.[6] It is, therefore, respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

L. E. BLAISDELL.

[6] Because an opinion has not yet been delivered by the Ninth Circuit on the Petition for review of the Federal Commission's order, and because a petition for a writ of certiorari from the ruling in that Court is a probable eventuality, it may be deemed desirable to withhold action in this Court on the present cause.

APPENDIX

Federal Power Act, 16 U. S. C. 791.

Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties; jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation

shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purpose of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

* * * * * * * *

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the

transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * * * *

Sec. 3. The words defined in this Section shall have the following meanings for purposes of this Act, to-wit:

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, state, or municipality licensed under the provisions of Section 4 of this Act, and any assignee or successor in interest thereof;

* * * * * * *

(7) "Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry

on the business of developing, transmitting, utilizing, or distributing power.

* * * * * * *

Mineral County Power System Act

Section 2 as amended, Stats. 1925, page 55:

Section 2. The board of county commissioners, hereinafter referred to as the "Board of Managers," or the "Board," shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either within or without the State of Nevada, for the purchase of electric energy and current.

In so far as here pertinent, Nev. Comp. L. (1929) Sec. 6106 defines public utility subject to the Nevada Commission's jurisdiction as "every corporation * * * that now or hereafter may own, operate or control * * * any plant or equipment or any part of a plant or equipment *within the State* for the production, delivery or furnishing for or to other persons * * * light, power in any form * * *." (Italics supplied.)

Section 6149, Nev. Comp. L. (1929):

"SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada, *Petitioner*,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a Corporation, *Respondents*.

On Writ of Certiorari to the Supreme Court of the State of California

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BRIEF FOR PETITIONER

L. E. BLAISDELL,
Attorney for Petitioner,
Hawthorne, Nevada.

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On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE COUNTY OF MINERAL

OPINIONS BELOW

The opinion of the Public Utilities Commission (Govt. R. 6-19)[1] is reported at 50 Cal. P.U.C. 749. The order of the Supreme Court of the State of California denying the writ of review without opinion (R. 38) is reported at 38 Adv. Cal. 323.

[1] "Govt. R. —" refers to the record in No. 205, companion case to this.

JURISDICTION

The Supreme Court of the State of California entered its order denying a writ of review on January 21, 1952 (R. 38). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 46). By order of Mr. Justice Douglas, dated May 1, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952 (R. 47). The petition for a writ of certiorari was filed on July 16, 1952, and was granted on October 13, 1952. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The over-all question is whether the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, over a sale made in California by the California Electric Power Company to Mineral County of electric energy which the County transmits from the point of delivery in California to points in Nevada, for local distribution and sale at retail to Mineral County inhabitants.

Specifically the questions are:

1. Whether an interstate sale to the County is a "sale of electric energy to any person for resale" subject to Federal Power Commission regulation under Sections 201(d) and 205 of Part II of the Federal Power Act, rather than to regulation by the California Commission.

2. Whether Section 20 of Part I of the Power Act authorizes states to regulate an interstate wholesale rate of a Part I licensee so as to preclude Federal Power Commission regulation under Section 205 of Part II and, if so, whether the Nevada Public Service Commission is a "properly constituted" authority to fix such a rate by agreement with the California Public Utilities Commission within the meaning of Section 20.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copies of the Act which are being lodged with the Clerk for the convenience of the Court. Pertinent provisions of the Nevada statutes relating to petitioner are set forth in the Appendix, *infra*, pp. 13-17.

STATEMENT

Conflicting Commission Orders Affirmed by Different Courts. The identical orders of the Supreme Court of the State of California under review here and in No. 205 were entered in companion proceedings in that court (R. 38, Govt. R. 68). By those orders the County of Mineral, Nevada, and the United States were severally denied the review they sought of the order of the California Commission issued July 3, 1951 (Govt. R. 19), asserting regulatory jurisdiction over the rates which California Electric Power Company charges for electric energy sold and delivered to Mineral County and to the Navy Department, respectively (Govt. R. 19).

The California Commission's order was issued in conflict with an earlier order of the Federal Power Commission (Govt. R. 40-41) in which the Federal Commission had asserted regulatory jurisdiction over the same rate.[2] Both

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[2] The conflict is clearly shown by comparison of the orders. The Federal Commission's order, issued April 13, 1951, directed the Company, *inter alia*, to "cease and desist from charging Mineral County Power System any rates and charges other than those reflected in filed Rate Schedule FPC No. 15, until and unless such schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order" (Govt. R. 40-41).

The California Commission on July 3, 1951, ordered that the Company, *inter alia*, "is hereby * * * directed to charge and collect from Mineral County Power System * * * the rates prescribed for such service by Decision No. 41798, viz., the rates set forth in Schedule P-3 attached to such decision" (Govt. R. 19).

Use of that P-3 rate instead of the FPC No. 15 increased the charges to petitioner approximately 43 percent, or $15,372.11 over a sixteen months' period, according to a finding of the Federal Commission which has not been questioned (Govt. R. 27).

See *infra*, pp. 7-8.

Commissions' orders were based upon the same record, a concurrent hearing[3] having been held by the two Commissions on the jurisdictional issues (Govt. R. 7, 10-11, 28).

The Federal Commission's order was affirmed on review by the Ninth Circuit on October 14, 1952, and rehearing denied November 12, 1952.[4] Mandate was stayed until December 22, 1952, to permit the filing in this Court of a petition for certiorari, and the petition was filed December 11, 1952. No. 495, this Term. The California Commission, respondent herein, had submitted a brief and participated in the oral argument before the Ninth Circuit as *amicus curiae*. No. 495, III R. 655.

Petitioner, Its Facilities and Operations. Petitioner herein, the County of Mineral, a political subdivision of the State of Nevada, owns and operates an electric utility system under the name of Mineral County Power System. The Board of County Commissioners is *ex officio* the Board of Managers of the System, and County officers, including the District Attorney, serve *ex officio* for the System. Nev. Stats. 1921, p. 80; 1923, p. 366; 1925, pp. 55-56, 58-60; 1945, pp. 332-333. Pertinent portions of these statutes are reproduced in the Appendix, *infra*, p. 13-17.

The Mineral County Power System owns and operates transmission and local distribution facilities by which petitioner receives delivery of electric energy from respondent, California Electric Power Company, at the latter's Mill Creek plant in California; transmits the energy into Nevada; and there locally distributes and sells it at retail to 823 customers in Hawthorne, Luning, Mina, Sodaville, and other points, all in Mineral County. Petitioner transmits energy over its transmission facilities approximately 50 miles to Hawthorne, Nevada, crossing the state boundary about midway; thence 26 miles to Luning; thence 8

[3] Concurrent hearings with state commissions are provided for by the Federal Power Commission's rules. 18 C. F. R. § 1.37(e).

[4] California E. P. Co. v. F. P. C., No. 12387. No. 495, III R. 667. The opinion is reproduced, No. 205 Pet. Br. App. B, pp. 83-91.

miles to Mina; and thence 4 miles to Sodaville. The line from the Mill Creek plant as far as Sodaville is a 55,000 volt line but the portion from Mina to Sodaville is operated at 7200 volts. At each of the places in Nevada referred to above, stepdown transformer stations reduce the voltage to local distribution levels. Petitioner's sole source of supply of the energy required to carry its load is through purchase from respondent, California Electric Power Company, except as it may receive assistance in emergencies from Diesel generating units at the Naval Ammunition Depot at Hawthorne. All of the energy so purchased is resold, none being used by petitioner itself, except incidental transmission and transformer losses (about 25 percent) and energy used in the System's shop and office building (less than one-tenth of one per cent). Govt. R. 26; No. 495, I R. 231, *et seq.*, R. 295.

The Company's Attempted Increase Over Its Filed Rate. The respondent Company and its predecessor have been selling energy to Mineral County since 1936 under rate schedules filed with the Federal Power Commission pursuant to Section 205(d) of the Federal Power Act. No. 495, II R. 585-615. The last rate schedule filed by the Company was designated as its Rate Schedule FPC No. 15. It was made effective as of October 5, 1945, by Commission order. Govt. R. 26. In a statement which has not been questioned, the opinion of the Federal Commission pointed out that "No rate schedule setting forth new rates has been filed with us by [the Company] and Rate Schedule FPC No. 15 has never been cancelled in accordance with our rules." Govt. R. 27. On the other hand, so far as has appeared, the Company never filed a rate schedule for any of those sales with the California Commission and that Commission never asserted jurisdiction over the sales except as set forth in the July 3, 1951, order.[5]

[5] In its July 3, 1951, opinion the California Commission declared (Govt. R. 9): "Mineral County Power System and the Navy were served under special contract rates *differing from filed tariff rates* for a number of years." (Emphasis supplied.)

However, having obtained a general rate increase from the California Commission on July 1, 1948, effective August 1, 1948 (Govt. R. 9), the respondent Company on July 30, 1948, notified petitioner that the Company would apply the "P-3" schedule prescribed by the California Commission for "Resale Power" in billing petitioner, as of October 5, 1948. This represented a 43 percent increase over the rates petitioner had been paying, or approximately $1000 per month (Govt. R. 27). On October 15, 1948, the Company submitted the P-3 schedule to the Federal Commission for filing to supersede its Rate Schedule FPC No. 15.[6] After four successive requests from the Federal Commission that the Company submit the additional data which the Commission's rules require to be included in rate schedule filings, showing the support for proposed rate increases, the Company on March 22, 1949, advised the Commission that it would not "go ahead with these filings." Govt. R. 26-27.

Commission Proceedings. In August, 1949, the Federal Commission discovered after repeated inquiry that the Company had been charging the increased rate notwithstanding its failure to effectuate a filing thereof. Govt. R. 27. Promptly after such disclosure the Company, in August, 1949, asked the California Commission to declare applicable, or apply, its July 3, 1948, rate order to this sale, as well as the one to the Navy, in supplemental applications filed with that Commission (Govt. R. 27, 6, 2; R. 1-2).[7]

In December, after one hearing on the supplemental applications had been held by the California Commission,

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[6] Section 205(d) of the Power Act requires thirty days' notice of a change in a filed rate to be given by filing new schedules with the Commission, "[u]nless the Commission otherwise orders."

[7] The Company's response to the Federal Commission's inquiries had also disclosed that it regarded its sale to the Navy as presenting a somewhat similar problem (No. 495, II R. 565) although that rate had never been filed with the Federal Power Commission or, apparently, treated by either the Company or the State Commission as subject to state regulation.

Mineral County complained to the Federal Commission that it had been overcharged and that the overcharge was continuing. It sought refund of the excess and restoration of the schedule filed with the Federal Commission "until such time as permission to change this schedule has been authorized by the proper authority." No. 495, II R. 537-538.

After communications between the California Commission and the Federal Commission and notice to the Nevada Commission among others (No. 495, I R. 7-8, 10-12), the concurrent hearing referred to above was held on the jurisdictional issues raised by the Company's supplemental applications to the California Commission and by the Federal Power Commission's show cause order relating to the apparent violations of Sections 20 and 205(d) of the Power Act and Sections 35.20 and 35.3 of the Rules and Regulations thereunder (No. 495, I R. 1-10).

Mineral County appeared in the proceeding before the California Commission (Govt. R. 6) and before the Federal Power Commission (Govt. R. 24) and appeared and introduced evidence at the concurrent hearing (No. 495, I R. 149, 227-262, 326-327). It intervened in the proceeding in the Ninth Circuit on review of the Federal Commission's order (No. 495, III R. 657). It petitioned the California Commission for rehearing of that Commission's order of April 13, 1951 (R. 5-8), and after its petition was denied on July 31, 1951, it filed its petition in the Supreme Court of California for a writ of review.

Effect On Retail Customers. While petitioner has been engaged in the foregoing proceedings before the two Commissions and the courts on review, in San Francisco and Washington, D. C., it has continued for over four years since October 5, 1948, to pay respondent Company at rates greatly in excess of those fixed in the schedule on file with the Federal Power Commission. For the last year and a half, the Federal Commission's order directing adherence to the filed rate has been stayed by order of the Ninth Cir-

cuit which requires the Company to segregate the excess (No. 495, II R. 646-648). The cumulative total of all excesses since October 5, 1948, amounted to approximately $59,652.54, or 45 percent, as of October 24, 1952,[8] and continues to accrue at the rate of about $1700 per month. The $59,652.54 total amounts to more than $90 per retail customer.

Any recovery of such accumulated excesses from respondent Company would be credited to the "Light and Power Fund" in the county treasury. As of November 30, 1952, there was $63,487.48 in said fund, according to petitioner's records. When and if the fund exceeds $90,000 it will become mandatory upon the board of county commissioners under the terms of the Nevada statutes "to call a public hearing for the consideration of power rate reduction equitable with the operating revenue being received by the system."[9] Thus petitioner's customers stand to benefit from a recovery of excesses.

ARGUMENT

—For our argument we adopt and urge as our own the argument in petitioner's brief in No. 205, with and subject to the following supplementary discussion of the differences in Mineral County's position from that of the Navy, petitioner in No. 205.

(1) The California Commission, having admitted that the sale to Mineral County (Govt. R. 16-17; R. 23), unlike that to the Navy (No. 205 Br. in Opp. 16-17), is one in which Nevada as well as California is directly concerned, to defend its jurisdiction falls back on the claim that it is authorized under Section 20 of the Federal Power Act to regulate this sale, even if it is in interstate commerce, because both California and Nevada have provided commis-

[8] These figures have been obtained from the files of the Federal Power Commission.

[9] Nev. Stats. 1945, pp. 332-333.

sions qualified to enforce the requirements of Section 20 and they have not been shown unable to agree on the rates fixed by the California Commission (P. U. C. Br. in Opp. 14). The Company makes the same claim (Co. Br. in Opp. pp. 10-12).

But this claim errs in assuming that Section 20 authorizes regulation by a single state acting unilaterally, under the usual state regulatory statute, as contemplated by the preceding Section 19 for all cases except where the power enters interstate commerce. For Section 20 contains a substantive provision, not found in Section 19, that interstate rates and service "shall be reasonable, nondiscriminatory, and just * * * and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful"; Section 20 also provides that "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission * * * to enforce the provisions of this section * * *."

Two things are plain, from this wording, as to the state action therein contemplated: (a) It is the service and rate standard of Section 20 which is to be "enforced"—not a state law standard as in Section 19—and enforced by a "commission or other authority" provided by a state for the purpose of enforcing that standard (and the rest of Section 20); (b) The enforcement of that standard must be the result of agreement upon that enforcement by "properly constituted authorities" of each of the states directly concerned.

Hence, irrespective of whether California has provided a commission qualified under Section 20 as thus understood, it is clear that Nevada has not done so, as shown in petitioner's brief in No. 205 (pp. 59-62) and as found

by the Federal Commission (Govt. R. 31). For if any one thing is clear it is that the Nevada Commission neither has nor claims any authority over California Electric Power Company's sale to Mineral County; and respondents' assertion of the Nevada Commission's authority over Mineral County's rates and operations (P. U. C. Br. in Opp., 12-14; Co. Br. in Opp. 3-4) should not be allowed to obscure that fact.

Moreover it necessarily follows from the fact that Nevada, at least, has not provided a commission or other authority qualified to enforce the requirements of Section 20 that the "States are unable to agree through their properly constituted authorities on * * * the rates or charges * * * " as the Federal Commission found in the passage referred to above. Mere absence of disagreement is not enough to preclude Federal Commission action. *Safe Harbor W. P. Corp.* v. *F. P. C.*, 179 F. 2d 179, 191-193 (C.A. 3), *certiorari denied*, 339 U. S. 957. Equally clearly, "agreement" by a state agency, such as the Nevada Public Service Commission in this case, which has been charged by the State of Nevada with no responsibility or authority of any kind whatever as to the regulation of the Company's rates here in question would be completely meaningless. It would have no more legal effect than "agreement" thereto by a state board of medical examiners. As the Third Circuit said in the first *Safe Harbor* case (124 F. 2d at p. 806): "It was the intention of Congress that there should be regulation and control of hydroelectrical energy and not that impotent public bodies would be set up by the states to go through the motions of regulation."

Thus, Section 20, by stipulating inability to agree among the state agencies as to the condition precedent to Federal Commission regulation, made plain that the state regulation intended was regulation by the states directly concerned as equals, not by one assuming the prerogative of regulation, and the other the role of petitioner or

protestant before it, as the California Commission would have it.

(2) Another difference is that petitioner, Mineral County, although a "municipality" within the Power Act's definition in Section 3(7), is squarely within the prior Commission and court decisions referred to in the brief of petitioner in No. 205 (pp. 29-30, 44-45), which involved sales to "municipalities." Consumers, who were to be protected from excessive charges by the Power Act, as by the Natural Gas Act[10] (*F.P.C. v. Interstate N. G. Co.*, 336 U. S. 577, 581), benefit, either as taxpayers or as rate payers, from federal regulation of wholesale rates charged a municipality, no less than customers of a private utility, which is regulated by a state commission. So also it is clear that interstate sales for resale to municipal as well as to private utilities were beyond the constitutional power of the states to regulate and within the gap intended to be filled by Congress.[11] And the substantial number of such rates on file with the Federal Commission (see No. 205 Pet's. Br., p. 31, n. 12) discloses the practical importance of not upsetting the long-continued construction of the Power Act as applying to them.

(3) It may also be noted that this sale is admitted more broadly (R. 25; Govt. R. 8; R. 20), than that to the Navy (Govt. R. 14-15) to be a sale for resale and the California Commission does not claim, as it does with respect to

[10] 52 Stat. 821, 15 U. S. C. 717, *et seq.*

[11] The municipality of Chanute, Kansas, was one of the "distributing companies," referred to by this Court, to which Kansas Natural Gas Company made the interstate wholesale sales which the Court held beyond the constitutional power of the states to regulate in *Kansas v. Central Trust Company*, 265 U. S. 298, No. 137 Oct. Term 1923, R. 14. That case, *sub nomine Missouri v. Kansas Gas Company*, and the later *P. U. C. v. Attleboro S. & E. Co.*, 273 U. S. 83, disclosed the extent of the gap in the constitutional power of the states to regulate gas and electric utilities which was one of the reasons for the enactment of the Power Act and the Natural Gas Act. *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464, 470-471.

the sale to the Navy (No. 205, P. U. C. Br. in Opp. 8), that its order does not amount to a fixing of the rate and so does not impose a burden on interstate commerce beyond the constitutional power of a state to impose. Thus, there can be no basis here for any claim like that made by the California Commission in No. 205 (No. 205 P. U. C. Br. in Opp., p. 15) that regulation of the sale was a power left by Part I to the State of California, as a power which it possessed in the silence of Congress.

CONCLUSION

For the reasons set forth in petitioner's brief in No. 205 as supplemented herein, it is respectfully submitted that the order of the Supreme Court of the State of California affirming the order of the California Commission should be reversed.

L. E. BLAISDELL
Attorney for Mineral County

APPENDIX

Particularly pertinent provisions of the Nevada statutes are as follows:

CHAP. 45—*An Act to authorize the board of county commissioners of the county of Mineral, State of Nevada, to purchase, acquire and construct an electrical power and telephone line, extending from the Lundy generating plant of the Nevada-California power company situated in the county of Mono, State of California, to the town of Hawthorne, Nevada, and thence via Luning and Mina to the town of Simon in the county of Mineral, State of Nevada, and branches thereof; providing for the maintenance and operation of said line as a public utility; the issuance and sale of bonds therefor; the levy and collection of taxes for the payment of such bonds, and other matters relating thereto.*

[Approved March 4, 1921]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows: * * *

(Nev. Stats. 1921, p. 80)

Section 1. The county of Mineral, State of Nevada, acting by and through its board of county commissioners, is hereby authorized and empowered to purchase the electrical power and telephone lines now extending from the Lundy generating plant of the Nevada-California power company, situated near Lundy, in the county of Mono, State of California, to the town of Hawthorne, in the county of Mineral, State of Nevada, and known as the "Pacific Division" of the Nevada-California power company's system of light and power lines within the State of Nevada, and thereafter to maintain and operate the same as a public utility for the transmission, sale and distribution of electrical energy to consumers, and to construct, operate and maintain an extension of said line from the town of Hawthorne, via Luning and Mina, to the town of Simon in said Mineral County, with branch from Mina to Candelaria, and the same shall be known as the "Mineral County Power System." (Nev. Stats. 1923, p. 366)

Section 2. The board of county commissioners, hereinafter referred to as the "Board of Managers," or the "Board," shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either within or without the State of Nevada, for the purchase of electric energy and current; or to purchase any existing light and power line or integral part thereof; or to purchase or construct any necessary telephone lines for use in connection with the Mineral County power system; fix rates or tolls thereon; make any and all rules and regulations necessary and proper for the management, operation and control thereof, and may construct and operate branches or distributing lines, and operate substantions, transformers and other electrical appliances under the conditions hereinafter provided; *provided, however,* that nothing herein contained referring to contracts shall be construed as in any way superseding or repealing the provisions of any of the statutes of this state requiring an advertisement for bids for the purchase of materials and supplies in excess of five hundred dollars, as now required by law, or to permit the board to enter into contracts extending beyond their term of office, save and except contracts for the purchase of power or the sale of power; *provided further,* that in emergency cases the board, by unanimous resolution and order to be entered upon their minutes and reciting such emergency, may direct the purchase of any necessary materials in excess of five hundred dollars value, required for immediate repair of said system, without advertising therefor; *provided also,* that all contracts entered into by said board of managers with consumers for power service upon an industrial or commercial basis shall specifically require an advance deposit to be made each month of not less than seventy-five per cent (75%) of the estimated cost of power to be used by said consumer during the ensuing month, and shall also require that such advance payment must be made and paid to the county treasurer on or before the tenth day of each month, or the service shall be discontinued; such estimate shall be made by the board upon the recommendation of the engineer or general manager of the system, and be based upon the amount of installed and connected motor equipment and hours of use of said consumer (Nev. Stats. 1925, pp. 55-56)

Section 3. (a) This act contemplates primarily the purchase, distribution and sale of electrical energy by the Mineral County power system as a public utility in the towns of Luckyboy, Hawthorne, Luning, Mina, Candelaria, and Simon, over its lines, and the board of county commissioners are hereby authorized and empowered to maintain and operate said electric lines as a high tension electric power system, and purchase all necessary materials and supplies for use thereon or in connection therewith, and to operate transformers, substations and distributing systems at those points, or at other points to which the system lines may be hereafter extended, but nothing herein shall be construed so as to require or compel said board to maintain and operate said system at any of said points if, in the judgment of said board, as recorded in their minutes, it shall appear that so to do would be uneconomical and likely to result in an operating loss. (Nev. Stats. 1925, p. 56)

Section 15. (a) The county treasurer is hereby made ex officio treasurer of the said utility, without additional compensation, and shall be liable upon his official bond for the safe-keeping of all moneys which shall come into his hands, possession or control, under the provisions of this act, and for the faithful discharge of his duties hereunder; all moneys due to said utility shall be paid to said treasurer, who shall issue his receipt in quadruplicate therefor, one copy to be given to the person making payment, one copy to be filed with the county auditor; one copy with the general manager of the said system for his office files, and one copy to be retained by said treasurer in his office.

(b) The county auditor is hereby made ex officio auditor of the said utility without additional compensation, and shall be liable on his official bond for the faithful discharge of his duties hereunder, or such additional duties as may be imposed upon him by the board of county commissioners; all bills against such utility shall, after their approval and allowance by the board of county commissioners, be audited and allowed by said auditor in the same manner as other claims against the county.

(c) The county clerk is hereby made ex officio clerk of said utility, without additional compensation, and shall be liable upon his official bond for the faithful discharge of his duties hereunder, or such additional duties as may be

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IN THE

Supreme Court of the United States

October Term, 1952
No. 206

THE COUNTY OF MINERAL, State of Nevada, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Respondents.

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

Statement of Facts.

California Electric Power Company (Company) is a public utility electrical corporation generating, transmitting and distributing electric energy in the State of California and also a public utility engaged in the transmission and distribution of electric energy in Nye and Esmeralda Counties, Nevada which latter business and the lines used therefor, are distinct from the delivery of electric energy to the County of Mineral in California for sale and distribution in Mineral County, Nevada.

Company is a licensee under Part I of Federal Power Act (Act)[1] holding licenses for seven hydro electric power plants in Mono and Inyo Counties, California. At one of these plants (Mill Creek), Company delivers energy to Mineral County, and Mineral County transmits the same over its own transmission line into Nevada.

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[1] 49 Stat. 863; 16 U. S. C. 791 *et seq.*

The last contract existing between Company and Mineral County for such service expired October 5, 1948. Thereafter, Company asserted charges under its P-3 Schedule which had been approved by California Public Utilities Commission applicable to like business throughout Company's California system.

I.

The Sale by Company to Mineral County Is Not a Sale in Interstate Commerce.

All of the electric energy involved herein is, so far as generation and transmission by Company are concerned, strictly California intrastate energy. It is delivered to Mineral County at Mill Creek, California, and does not become interstate energy unless the transmission by Mineral County from California into Nevada makes it interstate commerce.

Section 201(f) of the Act provides:

> "No provision of this Part shall apply to, or be deemed to include, the United States, a state or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing," etc.

Mineral County is a political subdivision of the State of Nevada. Hence, the definition of interstate commerce in Section 201(c) to the effect that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed outside thereof" does not apply to Mineral County which transmits the energy from California into Nevada.

Mineral County is simply a customer of Company's Mono County, California, distribution system serving other customers at and around the Mill Creek Plant.

II.

Counsel for Mineral County Has No Authority to Renounce Jurisdiction of the Public Service Commission of Nevada or to Surrender the Contracting Autonomy of Mineral County to Federal Power Commission.

Even a resolution of the Board of Managers of Mineral County Power System could not operate to cast off the jurisdiction of Nevada Public Service Commission or to surrender the contracting autonomy of said county into the hands of a federal agency contrary to state laws. The presumption that an attorney has authority to represent his client could rise no higher.

In this case, counsel for Petitioner finds it necessary or convenient, in presenting the Petition herein, to renounce (p. 8) the jurisdiction of Nevada Public Service Commission over the rates of Mineral County in disregard of the provisions of state law to the contrary. He cites in the Appendix to his brief Section 2 as amended, Statutes 1925, page 55, but omits the critical provisions of Section 16 as amended, Statutes 1925, page 59, as follows:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of Nevada Public Service Commission, who may revise, raise or lower the same.*" * * * (emphasis added.)

Section 20 of the Federal Power Act requires of Nevada only a Commission "to enforce the requirements of

this section *within such State,*" and Nevada Public Service Commission is the usual and ordinary type of regulatory commission, with full power over the rates of Mineral County as contemplated by Section 20.

The act reflects a purpose of Congress to avoid a conflict of federal and state sovereignties, Federal Power Commission being an agency of the one and Mineral County of the other. Mineral County as a subdivision of the state has a contracting authority and autonomy of its own, deriving from the sovereignty of the State of Nevada, which ought not to be displaced or subordinated to the jurisdiction of a federal regulatory agency, Federal Power Commission, unless the intent of Congress to that end is abundantly clear.

Public Service Commission of Nevada has shown no purpose or desire to surrender its authority to the federal agency and the anxiety of counsel to do so on behalf of Mineral County is scarcely understandable and in excess of his authority under the Statutes of Nevada.

III.

Company's Sale to Mineral County Is Not a Sale at Wholesale, That Is, "To Any Person for Resale" and Hence Is Not Subject to the Jurisdiction of Federal Power Commission.

It is admitted by Petitioner that Company's sale to Mineral County is not subject to Federal Power Commission's jurisdiction unless it is a sale at wholesale, that is, "for resale."[2]

It is also admitted that, under the literal terms of the act[3] Mineral County is not a person, and sale to it is not

[2]Act, Sec. 201(b) and (d).
[3]Sec. 3(3), (4), (7); Sec. 201(d).

a sale of electric energy "to any person," so as to come under Federal Power Commission jurisdiction.

It has been contended by Federal Power Commission that, generally throughout the act, the term "person" does not include the United States, its departments or agencies, and this would seem to be equally applicable to a state and its political subdivisions and agencies. In a brief filed by Federal Power Commission in August, 1951, in the United States Court of Appeals for the 4th Circuit in Nos. 6273 and 6274, *United States ex rel. Chapman v. Federal Power Com. and Virginia E. & P. Co.* (later decided 191 F. 2d 796, cert. granted 72 S. Ct. 1034) this point was demonstrated in language so convincing that we quote and adopt it as our own.

> "'Person' is limited in Sec. 3(4) to mean 'an dividual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
>
> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T.V.A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T. V. A. and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

imposed upon him by the board of county commissioners; the clerk shall require all claims against such utility to be made and presented in duplicate, the original, after action thereon by the board of county commissioners, to be filed with the county auditor, and the duplicate retained in the office files of said power system.

(d) The sheriff of Mineral County and his deputies shall, without additional compensation, perform such duties in connection with the operation of such utility as may be required of him or them by the board of county commissioners, and they shall be liable upon their official bond for the faithful discharge of such duties.

(e) The district attorney shall, without additional compensation, act as attorney and counselor for said utility, and perform such duties as attorney and counselor thereof as may be required of him by the board of county commissioners; *provided*, he shall be allowed his necessary expenses incurred when required by said board to attend to matters connected with said utility away from his office, and such expenses shall be charged against said utility, and be audited, allowed and paid as are other claims against the county. He shall be liable upon his official bond for the faithful discharge of his duties hereunder.

(f) The board of county commissioners are hereby made an ex officio board of managers of said utility, without additional compensation, unless otherwise provided by law, and they shall cause to be kept all necessary records and books thereof. The record of proceedings of the said board of managers shall be kept separate and apart from the minutes of the board of county commissioners in volumes to be provided for the purpose, and all matters relating to such utility which shall come before said board for consideration and action shall be recorded therein, including claims approved for payment, and to which records a proper index shall be maintained. The board shall cause to be transcribed from the minutes of the board of county commissioners, all matters and proceedings relating to such utility from the date of its inception that there may exist a separate and consecutive record of all acts and proceedings affecting such utility, which record shall remain in the office of the county clerk; *provided, however*, all claims against such utility approved for payment by the

general manager thereof shall be finally acted upon and be subject to allowance or rejection by the board of county commissioners, and be audited by the county auditor as all other claims against such county. (Nev. Stats. 1925, pp. 58-59)

Section 16. The maintenance and operation of said Mineral County power system shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, subject to the supervision of the Nevada public service commission, who may revise, raise or lower the same. * * * (Nev. Stats. 1925, pp. 59-60)

* * *

Section 19. All revenues derived from the operation of such system and not including taxes shall be paid to the treasurer of Mineral County, who shall place them in the "Light and Power Fund," hereby created in the county treasury, and such fund shall be set aside and used exclusively for the maintenance and operation of the Mineral County power system. The board of county commissioners shall also, monthly, set aside such portion, being not less than ten percent (10%) of the net operating revenues of the system, together with eighty percent (80%) of the accumulated revenue of the system at the time of the passage and approval of this amendment, to establish a fund of not less than $75,000 to be used exclusively for repairs, replacement, and depreciation of the system, and said fund of $75,000 shall be maintained in the manner above described.

All monies in the said light and power fund remaining over and above the amounts required to be set aside as aforesaid, not exceeding $15,000, shall be used as a revolving fund for the maintenance, operation, and expansion of the Mineral County power system. Whenever such fund reaches the amount of $15,000, accruing from revenues of the system, it will become mandatory upon the board of county commissioners to call a public hearing for the consideration of power rates reduction equitable with the operating revenue being received by the system. (Nev. Stats. 1945, pp. 332-333)

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IN THE

Supreme Court of the United States

October Term, 1952

No. 206

THE COUNTY OF MINERAL, State of Nevada, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA EEECTRIC POWER COMPANY, a corporation,

Respondents.

BRIEF OF CALIFORNIA ELECTRIC POWER COMPANY IN OPPOSITION TO THE WRIT.

HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for California Electric Power Company.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A. D. 1952.

9-9-52—80

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OCTOBER TERM, 1952

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Petitioner,

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THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

EVERETT C. McKEAGE,
BORIS H. LAKUSTA,
514 State Building, San Francisco 2, California,
Counsel for Public Utilities Commission of the State of California.

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"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to,

which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *.

"From this action, it is abundantly clear that the Committee considered that 'person,' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner argues, however (Pet. pp. 13-18), that this Court should strike out and ignore the words, "to any person," as they occur in Section 201(d) of the act, because they were inserted by amendment as the bill passed through Congress and no mention of the critical words was made in the Committee reports. This seems to be carrying legislative history beyond the limit of tolerance.

The provisions referred to are not ambiguous or uncertain, but are clear, specific, and capable of enforcement. There is no occasion to resort to legislative history.

Petitioner's contention virtually announces a general rule that, *where a bill is amended in its legislative course, no critical words inserted by the amendment will be given effect by the courts unless the amendment is accompanied by a Committee report expressly mentioning an intent to insert such critical words.*

The point made by Petitioner is obviously one which should be addressed only to Congress.

The decision in Wisconsin-Michigan Power Co. v. Fed. Power Com., 197 F. 2d 472 (C. A. 7), *loc. cit.* 479, relied upon by Petitioner, is not persuasive. That Court seems to have assumed too much, viz., that "the apparent inconsistency was an oversight," and that the "'slip' was inadvertent." Moreover, in placing its decision on "the continued construction of the Act by the Commission," that Court was directly in conflict with the District of Columbia Circuit in *Pacific P. & L. Co. v. Fed. Power Com.*, 184 F. 2d 272, holding that twenty years of administrative construction by the issuance of numerous licenses for minor lines under the claim of jurisdiction to do so did not alter the statute, though the meaning of the statute was, to say the least, debatable.

Petitioner argues further that this Court should disregard the words "to any person," because to give them effect would be unreasonable in that it would deny to the state the benefit of one phase of federal regulation. But this is a mere conclusion of the pleader, and defeats itself, since it is admitted that Congress did deny to the state some degree of federal regulation. This is so, because

rates for energy sold in interstate commerce for consumption by the purchaser are not subject to Federal Power Commission jurisdiction.[4]

The argument that *Attleboro,* 273 U. S. 83, exposed the gap in regulation as to wholesale sales to both public utilities and non-public utilities and, hence, the act was intended to close the gap as to one as well as to the other, fails to convince. There are three possible gaps: (1) sales to public utilities for resale, (2) sales to governmental agencies for resale, and (3) sales to any one for consumption. The act did not close the gap as to (3), why must it have closed the gap as to (2)? Actually Sec. 201(a), (b) and (d) closes only the gap exposed in *Attleboro,* that is, (1) above, or sale in interstate commerce to a privately owned utility for resale. The inclusion of anything more rests entirely upon the wish or desire of the Petitioner or Federal Power Commission, and cannot be read into the act by an impartial examination.

The intent of Congress to exclude sales to Mineral County and Subdivisions and agencies of a state through the definition of the word, "person," in Section 201(d) is clear, for it conforms to the same intent manifested in the exclusion of those agencies in Section 201(f), and both results comport with the undoubted intent of Congress not to bring federal regulation unnecessarily into opposition to the sovereignty of the states.

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[4] *Fed. Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502; *Panhandle Eastern Pipe Line Co. v. Public Service Com.*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co. v. Fed. Power Com.*, 341 U. S. 329; *Connecticut L. & P. Co. v. Fed. Power Com.*, 324 U. S. 515, 529.

IV.

Under the Facts of This Case, Company's Rates Are Subject to Regulation Solely by a State Commission or State Commissions Under Sections 19 and 20 of the Act.

Sections 19 and 20 provide for the regulation of all of a licensee's rates, not merely those for the sale of power from licensed projects. Section 19 provides that every licensee which is a public service corporation (some are not) shall be subject to regulation by the state where the service is rendered or the rate charged, in this case, California. Section 20 provides that, if such power or any part thereof enters into interstate commerce, and if any of the states directly concerned has not provided a Commission to regulate the rates or such Commissions are unable to agree, then, jurisdiction is conferred on Federal Power Commission.

Under those provisions, it is immaterial whether or not interstate commerce be involved, for in neither event does Federal Power Commission have jurisdiction, there being no evidence in this case that any state commissions are unable to agree.

Since, under the facts of this case, regulation by a state or states has been provided for, Federal Power Commission has no jurisdiction under Part II of the act, it being provided in Section 201(a) that federal regulation under that part is "to extend only to those matters which are not subject to regulation by the States."

It will be observed that, as applied to various conditions, Sections 19 and 20 provide for some regulation of interstate commerce by states and for some regulation of intrastate commerce by federal agency. The explanation of

what ordinarily would not conform to the powers of Congress under the Commerce clause lies in the fact that Part I of the act was not enacted primarily under the commerce clause, but under Section 3 of Article IV of the Constitution, giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property of the United States."

The Company's licenses are 50-year contracts in the nature of leases of public lands, founded on mutual benefits and detriments to the parties. In making such disposition of the property of the United States, Congress can attach any conditions it wishes[5] unrestricted by the Commerce Clause as to distinctions between intrastate and interstate commerce. As a term of the lease, it could have made all commerce resulting from the operation of the projects, both intrastate and interstate, subject to state regulation, or all subject to federal regulation, or it could provide, as it in fact did provide, that in the first instance all rates should be subject to state regulation, which, under certain conditions should give way to federal regulation.

Pennsylvania Water & Power Co., 343 U. S. 414, and *Safe Harbor Water Power Co.*, 179 F. 2d 179 (C. A. 3) (certiorari denied 339 U. S. 957), are not contrary to but confirmatory of these principles. In both cases, interstate commerce being indisputably involved; it was found that the state commissions were unable to agree, thus under the express provisions of Section 20 of the act, transferring jurisdiction to Federal Power Commission.

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[5] *Camfield v. United States*, 167 U. S. 518; *Light v. United States*, 220 U. S. 523.

We understand that a judicial decision is authoritative only for the law as applied to the facts of that case. There is nothing in either case explaining what would be the consequences in the absence of the critical finding that the state commissions were unable to agree. There we would have power to regulate conferred on both state and federal commissions, precipitating an incongruous condition.

Neither of the two decisions last mentioned makes any disposition of this apparent conflict. In *Safe Harbor Water Power Co. (supra)*, the Third Circuit definitely held that Part II did not repeal Sections 19 or 20 of Part I, and in *Pennsylvania Water & Power Co* this Court did not discuss the point, except to say (72 S. Ct. pp. 845-846):

> "It may be possible that some future case will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

Evidently, this Court intended to limit its decision to the facts of that case and not to decide other facts by dictum.

In first *Safe Harbor*, 124 F. 2d 800 (C. A. 3), it was held that, where interstate wholesale rates of a licensee were involved and there was no evidence that the State Commissions were unable to agree, Federal Power Commission had no jurisdiction. This seems to be supported by *Alabama Power Company*, 128 F. 2d 280, and *Niagara Falls Power Co.*, 137 F. 2d 787.

Following the decision in first *Safe Harbor*, a change in facts occurred in that Public Service Commission of Maryland on August 30, 1944, addressed a letter to Federal Power Commission asking it to conduct an investigation of the interstate rates between Pennsylvania and Maryland, which letter formed the basis for the finding in both cases relied upon by Petitioner (*Second Safe Harbor* and *Pennsylvania W. & P. Co.*) that the two state commissions were unable to agree, thereby vesting jurisdiction in Federal Power Commission under Section 20.

The writ should be denied.

Respectfully submitted,

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for California Electric Power Company.

4. THE THREE REASONS SPECIFIED BY MINERAL COUNTY FOR GRANTING A WRIT ARE INSUBSTANTIAL.

Mineral County argues (Petition, 6, 7) (a) that the California Commission was not justified in construing the Federal Power Act literally and should instead have reached a conclusion similar to that in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952); (b) that the California Commission premised its decision upon a proposition declared unsound in *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952); (c) that it was erroneous for the California Commission to find the Nevada Public Service Commission to be the kind of regulatory commission contemplated by Section 20 of the Federal Power Act. These three arguments do not justify certiorari as will be demonstrated in the following:

a. The Wisconsin-Michigan case.

So far as here pertinent the Seventh Circuit held in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952), (*Wisconsin-Michigan Power Co. v. Federal Power Commission*, No. 291, Oct. Term, 1952; *Wisconsin v. Federal Power Commission*, No. 294, Oct. Term, 1952), that sales of electric energy by a public utility to a municipality for resale by the latter fall within the purview of the term "sale of electric energy at wholesale" (Section 201(b)), that is, "sale of electric energy to any person for resale" (Section 201(d)), notwithstanding the fact that municipalities and other political subdivisions of a

state are expressly excluded from the definition of "person" in Section 3(4).

The Court recognized that its conclusion was contrary to the literal meaning of the statute (197 F. 2d at 479) but was persuaded by Government counsel to reject the literal meaning as an "oversight," an inadvertent "slip" on the part of Congress.

It would not be appropriate here to refute in detail the numerous invalid hypotheses which the Government pressed upon the Seventh Circuit in urging that Congress did not know what it was doing in defining sales at wholesale. It is sufficient to point out that the Court was asked to impute to a word a meaning diametrically contrary to the express definition thereof in the same statute, casting aside the principle of statutory construction that the plain meaning of a statute must be accepted in the absence of manifest error and substituting in its stead a presumption of careless draftsmanship.

The legislative history leaves no mistake that Congress in enacting Part II of the Federal Power Act was dealing specifically with a gap revealed in the *Attleboro* case (*Public Utilities Commission v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)) where one utility sells in interstate commerce to another *utility* for resale. See *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). A political subdivision is not in the same category as a public utility. Utilities as private enterprises are not necessarily primarily concerned with the cost to the consumer. If they agree to make wholesale purchases at an improvident rate, there is a

danger that they may seek to pass that cost on to the retail consumers. Political subdivisions, on the other hand, have an identity of interest with their consumers. The same danger of improvident wholesale rates does not exist. The policy of Congress in enacting Part II was to protect consumers who needed protection, not those who did not. Certainly political subdivisions themselves do not need the intervention of a federal protector, and their consumers are amply protected by those political subdivisions.

The *Wisconsin-Michigan* case is currently the subject of two petitions for writs of certiorari filed in this Court, Nos. 291, 294, this term.

b. The Penn Water case.

In *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952), this Court dealt with the contention that Penn Water, as a type of "public utility" subject to regulation under Part II, was nevertheless not subject to regulation thereunder because it was a licensee subject to regulation under Part I. This Court rejected the contention, saying (343 U.S. at 418):

> "It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one. We hold that Penn Water is subject to regulation under Part II of the Act. It is also subject to Part I regulation since the Commission found on substan-

tial evidence, as the court below held, that the States were 'unable to agree' within the meaning of Section 20 of Part I of the Act."

The decision of the California Commission is consistent with this language. The following paragraph outlines the California Commission's reasoning.

If Part I alone of the Federal Power Act were assumed to exist, the machinery set up by Congress in Section 20, to enable states under certain conditions to exercise jurisdiction without burdening interstate commerce, would be available and make it possible for California to regulate the sales to Mineral County, since California and Nevada were not shown unable to agree on the rates fixed by the California Commission. It follows that since state jurisdiction would have been allowed prior to the enactment of Part II by virtue of the machinery alluded to, Part II by its own terms in Sections 201(a) and 201(b) operated to deny Federal Power Commission jurisdiction since those sections expressly reserve to the states whatever jurisdiction they possessed prior to the enactment of Part II.

We find nothing in the *Penn Water* case to invalidate the ground of the California Commission as thus stated. It must be remembered that the *Penn Water* case did not involve facts showing an absence of disagreement between two states. Whenever the states *are* shown unable to agree, as in the *Penn Water* case, the machinery of Section 20 to preserve state jurisdiction is not available and accordingly Sections 201(a) and 201(b) cannot be in-

voked to preclude Federal Power Commission jurisdiction.

c. The Nevada Public Service Commission is the kind of regulatory commission contemplated by Section 20, and Nevada was not shown unable to agree on the rate fixed for sales to Mineral County.

The Nevada Public Service Commission clearly has jurisdiction over the rates Mineral County charges its consumers. Nevada Statutes, 1925, page 55, Section 16, provides:

> "Sec. 16. The maintenance and operations of said Mineral County Power System shall be under the control, supervision and authority of the board of managers and rates charged to consumers for sale and distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis added.)

Mineral County fails to cite this provision in the Nevada law. It quotes certain other Nevada statutory provisions (Petition, 13) presumably with the intent of showing that since the Nevada Public Service Commission has no authority outside Nevada and no authority either within or outside Nevada over wholesalers of electric energy, it is disqualified under Section 20. But under Section 20 the state commission must be one:

> ". . . to enforce the requirements of Section 20 within such state . . ."

"Requirements" refers to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable. Since the Nevada Public Service Commission clearly has jurisdiction over the reasonableness of the rates charged by Mineral County to its ultimate consumers, i.e., jurisdiction over the reasonableness of the rates charged by one purchasing from a licensee for resale within Nevada; it qualifies under Section 20 and it is quite immaterial that it lacks extraterritorial powers or any other powers. Congress certainly did not intend that state commissions, to qualify under Section 20, must have extra-territorial powers, powers in conflict with the sovereign rights of a sister state, nor did it use language even suggesting such an incongruous condition. It took care to use the phrase "within such state" in defining the powers a commission must have to qualify.

Mineral County argues that even if the Nevada Public Service Commission is a qualified commission it "made no attempt to exercise any powers in this matter [as] is evidenced by the statement of the Chairman at the concurrent hearing of the two Commissions [the Federal Power Commission and the California Commission] (R. 24)." The statement of the chairman, however, was simply that the Nevada Public Service Commission was maintaining a neutral position on the question whether the California Commission or the Federal Power Commission had jurisdiction, and it in no sense constituted a statement, as Mineral County improperly suggests, that the Nevada

Public Service Commission was ignoring its supervisory jurisdiction over Mineral County's rates to its consumers.

---

5. IT IS NOT TRUE THAT MINERAL COUNTY IS LEFT, UNDER THE DECISION OF THE CALIFORNIA COMMISSION, "WITH THE DUBIOUS PROTECTION OF RATE REGULATION BY A COMMISSION OF ANOTHER STATE . . ." (Petition, 8).

The California Commission's decision proceeds upon the *admitted fact* that there has been no showing of inability to agree on the rates fixed by California for the sales by California Electric Power Company to Mineral County. Under Section 20, should Nevada at some future time register disagreement over the rates in question, the California Commission's jurisdiction will automatically cease, and Federal Power Commission jurisdiction will take over. Thus if Mineral County is now dissatisfied with the rate which the California Commission has prescribed, its remedy is simple enough. All it need do is persuade the properly constituted state authorities of Nevada to register disagreement with the State of California. The California Commission's jurisdiction will then cease.[5]

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[5]This presupposes, of course, that the sales are in interstate commerce and that Section 20 applies. If the sales are eventually found to be in *intra*state commerce, Section 19 would apply and California jurisdiction would be retained.

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CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
September 15, 1952.

Respectfully submitted,

EVERETT C. MCKEAGE,

BORIS H. LAKUSTA,

Counsel for Public Utilities Commission of the State of California.

In the Supreme Court

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OCTOBER TERM, 1952

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Petitioner,

vs.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission is reported at 50 Cal. P.U.C. 749, but, strangely, is omitted from the Transcript of Record.[1] The order of the California Supreme Court denying a petition for writ of review is noted in 38 A.C. 323 (R. 38) and its order denying rehearing is noted in 38 A.C. 484 (R. 46). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The over-all question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, order California Electric Power Company to charge certain rates in selling electricity to Mineral County, Nevada, said County taking delivery in California and transmitting the energy over its own lines to Nevada for resale to ultimate consumers in that state.

The subsidiary questions are:

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[1] Petitioner Mineral County as indicated in its Petition, Footnote 1, page 1, seeks to cure the inadequate record by referring to the "more complete record in the related case of *United States v. The Public Utilities Commission of the State of California*, No. 205, this term." We shall of necessity adopt Mineral County's procedure of referring to that record and shall designate it in the same way, i.e.,: (Govt. R. .....).

(1) Does Part I of the Federal Power Act, giving the Federal Power Commission jurisdiction over sales of electric energy by licensees only in the exceptional circumstances set forth in Sections 19 and 20, give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the California Commission is admittedly a qualified commission, where the Nevada Public Service Commission is specifically authorized by statute to regulate the rates which Mineral County charges its consumers, and where the states of California and Nevada have not been shown unable to agree on the rates charged by California Electric Power Company to Mineral County for wholesale electric energy?

(2) Does Part II of the Federal Power Act, giving the Federal Power Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce but . . . not . . . any other sale" (Sec. 201(b)), give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the purchaser is not a public utility but Mineral County, a political subdivision of Nevada? The answer depends upon (a) the nature of the sales as being in interstate commerce or not; (b) the definition of "person" in Section 3(4) and the application thereof to the facts in construing Section 201(d) of the Act which defines "sales of electric energy at wholesale"; (c) the applicability of Section 201(f) exempting political subdivisions of a state from the provisions of Part II; (d) the applicability of Sections 201(a) and 201(b) which preserve state jurisdiction if it existed before.

STATUTES INVOLVED.

The pertinent provisions of the Federal Power Act (21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act which it is understood was submitted with the petition in the related case of *United States v. Public Utilities Commission*, No. 205, this term.

The pertinent provision of the Nevada Statutes is Section 16, Nevada Statutes of 1925, page 55. It is quoted below on page 12.

STATEMENT.

A jurisdictional dispute exists between the California Public Utilities Commission and the Federal Power Commission over the regulation of rates for sales of electric energy by California Electric Power Company to Mineral County.[2] The California Commission's order has been sustained by the California Supreme Court, whose action in denying a writ of review constitutes a determination upon the merits.[3] The Federal

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[2]Mineral County, a political subdivision of Nevada, is designated "Mineral County Power System" in selling electric energy to consumers in the County.

[3]Public Utilities Code (Cal. Stats. 1951, ch. 764), Section 1757. *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 747 (1936); *People v. Hadley*, 66 Cal. App. 370, 375 (1924). In *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920), this Court recognized that under the California statute the denial of a writ of review by the California Supreme Court respecting an order of the Public Utilities Commission (formerly Railroad Commission) is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority

Power Commission's order (reversing the examiner's proposed opinion) has been subjected to review before the United States Court of Appeals for the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act. *California Electric Power Company v. Federal Power Commission,* C.A. 9, No. 12987. Oral argument was had on August 4, 1952. No decision has been rendered to date.

Mineral County's position is that the sales to it by California Electric Power Company are subject to Federal Power Commission jurisdiction, not California Commission jurisdiction. Mineral County went so far as to adopt, as its points and authorities in seeking California Supreme Court review, the opinion of the Federal Power Commission in the cognate show-cause proceeding (R. 4), an opinion which for the time being means lower rates to Mineral County than those ordered by the California Commission. Such latter circumstance would suggest the motivation for Mineral County's position.

Since the energy which California Electric Power Company sells to Mineral County is derived in part from federal water power projects of which the company is licensee, and since the energy crosses the state line into Nevada where Mineral County as purchaser resells the energy to consumers in the County, both Part I of the Federal Power Act (applying to sales by licensees) and Part II of the Act (applying to sales at wholesale in interstate commerce) are involved in considering the question of jurisdiction.

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or violate any right of the several petitioners under the Constitution of the United States or of the state of California". (251 U.S. at 372).

ARGUMENT.

While admittedly this case raises questions under the Federal Power Act respecting the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy, it is believed this Court will desire to weigh the following circumstances in determining whether a writ of certiorari should issue:

1. THE OVER-ALL QUESTION IS PECULIARLY NARROW.

The fact that Mineral County is the purchaser is a controlling factor in determining the jurisdictional question. Accordingly, whatever the decision, the case can have no general applicability. Nearly all large purchases of electricity for consumption in another state are made by public utility distribution companies, not by political subdivisions of a state.

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2. THE CASE HAS SIGNIFICANCE ONLY WHEN RELATED TO ITS PECULIAR FACTS.

Under Part I of the Federal Power Act, state jurisdiction over sales by licensees is vouchsafed even where the sales are in interstate commerce, provided (a) the states "directly concerned" (b) have adequate regulatory bodies and (c) the states have not been shown unable to agree on the rates to be charged. These are largely factual determinations. Accordingly any case involving them can have significance only as limited by those facts. Such circumstance may have had impelling influence in this

Court's refusal to issue a writ of certiorari in the First and Second *Safe Harbor* cases.[4]

Not only under Part I but under Part III the peculiar facts render the case of limited significance. The sales are to a political subdivision of a state. The determination whether such sales are "sales to a person for resale" can have little general applicability.

3. THE CALIFORNIA COMMISSION'S DECISION DID NOT DEPEND UPON ANY FINDING THAT THE SALES ARE IN INTRASTATE COMMERCE.

It may be argued plausibly that the sales are not in interstate but intrastate commerce as defined in Section 201(b). See Brief in Opposition herein, page 2, filed by California Electric Power Company. However, the California Commission came to its conclusion independently of the interstate commerce question. In construing the Federal Power Act it assumed, for purposes of argument at each juncture in the development of the decision, that interstate sales were involved. Thus there is eliminated any concern which this Court might entertain, at this stage of the proceeding, as to the correctness of any determination below respecting the interstate or intrastate nature of the sales.

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[4] *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F. 2d 800 (3d Cir. 1941), cert. denied, 316 U.S. 663 (1942); *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179 (3d Cir. 1950), cert. denied, 339 U.S. 957 (1951).

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IN THE

Supreme Court of the United States

October Term, 1952

No. 206.

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

Statement of the Case.

Because this case so closely resembles No. 205, the United States of America v. the same Respondents, we believe it will be more considerate of the Court and promote clarity if we do not repeat verbatim those parts of the brief which would be the same as they appear in our brief in No. 205. Accordingly certain points will be covered by reference to our brief in that case.

It will be observed that Petitioner's Brief (p. 1) refers to the Record in No. 205 as "Govt. R." for the provisions of Decision No. 45913 of California Public Utilities Com-

mission, which is omitted from the Record in this case, No. 206. We will be obliged, likewise, to refer to the Record in No. 205 for some facts omitted from the Record herein.

The ultimate question involved in this case is whether Federal Power Commission (FPC) or California Public Utilities Commission (California Commission) with or without concurrence of Nevada Public Service Commission (Nevada Commission) has authority to regulate rates charged by Respondent, California Electric Power Company (Power Company or Company), for electric energy delivered and sold at its Mill Creek Plant in Mono County, California, to Mineral County Power System (Mineral County), which transmits such energy over its own transmission line for sale and distribution to the public in Mineral County, Nevada.

Company's Electric System.

Power Company renders public utility electric service in Southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside and Imperial Counties, and, to a much less extent, in Nye and Esmeralda Counties, Nevada. Its system extends in a fairly straight line about 300 miles from Bridgeport, the county seat of Mono County, California, to San Bernardino, California, from which it widens out into general areas of San Bernardino and Riverside Counties, California, where its largest service areas are located.

Power Company is subject to the jurisdiction of California Commission pursuant to Public Utilities Act of said state (Calif. Stat. 1915, p. 115, as amended; Deering Gen. L. Act 6386).

Power Company is also subject to the jurisdiction of Nevada Public Service Commission by reason of business done in Nye and Esmeralda Counties, Nevada, pursuant to the Public Service Commission of said state (Nev. Stat. 1919, p. 198; Nev. Comp. L. 1929, Secs. 6100 *et seq.*). Said Company is not, however, engaged in business in Mineral County, Nevada, and owns no facilities therein, its service in Nye and Esmeralda Counties being entirely distinct from its sale to Mineral County at Mill Creek, California, for resale in Mineral County, Nevada.

Licenses.

Power Company is a licensee [R. No. 205 p. 1] under Part I of Federal Power Act (Act) (16 U. S. Code, Secs. 791 *et seq.*), holding licenses for five hydro-electric projects covering nine plants, seven of which are on the Northern Division of Power Company's system and involved in service to Mineral County as follows:

	Mono County, California.	
Project	1390 Mill Creek Plant	2,500 kw
"	1388 Poole Plant	9,600 "
"	1389 Rush Creek Plant	10,500 "
		22,600 kw
	Inyo County, California	
Project	1394 Bishop Creek Plant 2	6,000 kw
"	" " " " 3	7,200 "
"	" " " " 4	6,000 "
"	" " " " 5	3,500 "
(Non Project)	" " " 6	2,100 "
		24,800 kw

From Mill Creek Plant, a 55 kv (kilovolt) line extends to Leevining Substation into which feeds the Poole Plant on Leevining Creek. From Leevining Substation, a 100 kv tie line known as Northern Division Tie Line extends through and past Rush Creek Plant, thence to the Bishop Creek Plants a distance of some 60 miles.

From and by means of said 55 kv line between Mill Creek and Leevining Substation, all of the local customers of Power Company in Mono County are served, directly or indirectly, including the Town of Bridgeport, the Town of Leevining, the Garbutt Mine, the Navy, and Mineral County Power System. Power Company sells and delivers electric energy to Mineral County at the Mill Creek plant substation or terminal of said 55 kv line, and the energy is metered in said substation, all the facilities of which are owned by Company, except the oil circuit breakers and disconnect switches which belong to the United States Navy.

Mono County being a sparsely settled, remote, mountainous area, the entire electric load therein, including energy sold to the Navy and to Mineral County Power System for use in Nevada, amounts to only 3050 kw (kilowatts) and so is normally carried by one or more of the Mono County Plants of a total 22,600 kw capacity. At times, however, said plants are restricted in generation so that some power flows north out of the Bishop Creek Plants, and formerly, in part, from a plant of the City of Los Angeles on the Owens River pursuant to a contract subsequently terminated.

From Bishop Creek, energy in excess of the comparatively small amount sold in Mono and Inyo Counties, flows south. No energy ever flows from the south into

Bishop Creek or into the Northern Division lines, so that only the part of Company's system consisting of plants and lines on and north of Bishop Creek are involved herein.

Contract With Mineral County.

Mineral County Power System is not a public corporation or district, but is the name under which Mineral County carries on the purchase, sale and distribution of electric energy to the public in said county, under the direction of the Board of County Commissioners, who, ex-officio, constitute the Board of Managers of said county-owned utility, as provided in the Statutes of Nevada the material portions of which are printed in the Appendix to Petitioner's Brief. Mineral County owns and operates a 55 kilovolt line extending from Power Company's Mill Creek Plant in Mono County, California to the town of Hawthorne, Nevada, from which branch lines extend to other parts of said county.

As of October 5, 1945, Power Company and Mineral County entered into a contract providing that *for the term of 3 years* Company would furnish and Mineral County would purchase all of the electric energy required by the County for resale and distribution in the State of Nevada at rates set forth in the contract, such energy to be delivered at the Jordan (Mill Creek) plant of Company. Said contract provided that it was subject to filing with FPC and was so filed as "Rate Schedule FPC No. 15."

Rate Proceedings Before California Commission.

Within two years after the close of the war in 1945, inflation, with consequent increases in operating costs, necessitated Power Company's application (No. 28791)

in October 1947 to California Commission for a general increase of rates throughout the Company's California System [R. No. 205 p. 2]. Pursuant to hearings at which Mineral County was represented, the California Commission, on July 1, 1948, effective August 1, 1948, issued Decision No. 41798 [R. No. 205 pp. 2, 8] authorizing increases in rates generally throughout Company's California System. Among the schedules of rates fixed by said decision was Schedule P-3 applicable to the sale of electric energy for resale.

Said contract expired by its terms October 5, 1948, and thereupon, Company began to charge Mineral County according to rates in Schedule P-3 [R. No. 205 p. 9]. There then arose a dispute as to whether said Decision No. 41798 had or had not applied to the Mineral County contract or to any rate for service to Mineral County at Mill Creek, California, it appearing that, while said contract had not been expressly mentioned in said decision, it was evident from the evidence and exhibits in said proceeding that all of the calculations of Company's revenues and expenses, made by Company, by the Commission's Staff and by other interested parties, included revenues and expenses in connection with sales to Mineral County, and, particularly, was this true in spreading the increases in rates among the several classes of consumers on Company's system [R. No. 205 p. 8].

In order to settle this dispute, Power Company, on August 8, 1949, filed with California Commission its First Supplemental Application to Application No. 28791,

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Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for Respondent, California Electric Power Company.

H. M. HAMMACK,
KENNETH M. LEMON,
Of Counsel.

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requesting a determination that Schedule P-2 fixed by Decision No. 41798 was applicable to Mineral County or, if not, that a proper rate for Mineral County be fixed [R. No. 205 pp. 2, 6]. A hearing was held on said Supplemental Application October 7, 1949, at which Mineral County was represented. That hearing was continued to a later date.

Proceedings Before FPC.

Meanwhile, some correspondence between California Commission and FPC resulted in an agreement between the State and Federal Commissions to hold a concurrent hearing on the matter involved in said proceeding before California Commission and on an Order to Show Cause to be issued by FPC. On February 15, 1950, FPC issued and served upon Power Company its Order to Show Cause, which is not in the Record, but the nature of which can be judged from the final Order of April 12, 1951 [R. No. 205 pp. 35-41], since the latter sustained every finding and order proposed by the former.

Following the concurrent hearing, held March 20-21, 1950, that is, before FPC on said Order to Show Cause, and before California Commission on said Supplementary Application in Application No. 28791, the Hearing Examiner for FPC filed his report (initial decision under the Administrative Procedure Act; 5 U. S. C., Sec. 1007) in which he sustained the contentions of Power Company in every respect and recommended the dismissal of the Order to Show Cause.

After considerable delay, FPC, one Commissioner dissenting, on April 13, 1951, issued its Opinion No. 212 and Final Order [R. No. 205 pp. 24-41], reversing the Hearing Examiner on all points and, among other things, ordering that, [R. No. 205, p. 41] Power Company cease and desist from charging Navy any rate other than that named in said expired contract of 1945 which had been filed as Schedule No. 15.

The FPC Order went to the Court of Appeals for the 9th Circuit on Certiorari pursuant to Power Company's petition filed June 21, 1951, where all points were decided against the Company October 14, 1952. (*California Electric Power Company, a corporation, Petitioner, v. Federal Power Commission, Respondent, County of Mineral, State of Nevada, and United States of America, Intervenors,* No. 12,987, ...F. 2d .....) Petition for Certiorari has been filed in this Court December 11, 1952.

California Commission's Decision No. 45,913.

On July 3, 1951, California Commission issued Decision No. 45,913 [R. No. 205, p. 6]. Petition for Writ of Review was filed by Mineral County with the Supreme Court of California, August 29, 1951 [R. No. 205, p. 1], which was dismissed January 21, 1952 [R. No. 205, p. 68], and rehearing denied February 18, 1952 [R. No. 205, p. 74].

Certiorari was granted by the Supreme Court October 13, 1952.

ARGUMENT.

I.

Neither the Board of Managers of Mineral County Power System nor the District Attorney Have Any Authority to Maintain This Action or Review for the Purpose or Effect of Transferring the Regulatory Powers of Nevada Commission Over Mineral County Power System Into the Rate Fixing Jurisdiction of FPC.

Nevada Statutes 1925, pp. 59-60, provide in part:

> "Section 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis supplied.)

The same Act in Section 15(e) provides that:

> "(e) The district attorney shall, without additional compensation, act as attorney and counsellor for said utility, and perform such duties as attorney and counselor thereof as may be required of him by the Board of County Commissioners, * * *".

There is nothing in Nevada law which confers on the Board of Managers authority to do anything but to control and supervise the business entrusted to them, *subject*

to the rate regulatory powers of Nevada Commission, and there is nothing in the duties imposed on the District Attorney to do aught but to represent the Managers in the exercise of their aforesaid powers.

Neither the Board of Managers, the District Attorney, nor both, have any authority to renounce or overthrow or deny whatever jurisdiction Nevada Commission has over the public utility business in which the County is engaged. This jurisdiction under State Law is to supervise the rates fixed by the Board and to "revise, raise, or lower the same." But, by reason of that power, Nevada Commission answers the description in Section 20 of Federal Power Act as being *"a Commission or other authority to enforce the requirements of this Section within such State,"* and hence it, together with California Commission, is capable of performing the conditions of Section 20.

The District Attorney, on behalf of the Board of Managers, purports to reject and disclaim this right and power of Nevada Commission and to disrupt the plan of State rate regulation embraced in Section 20, without any authority from the State Legislature, the Governor, the Attorney General, or the Nevada Commission.

As in the case of the Navy, in No. 205, Petitioner in this case seems to have assumed that FPC will fix more advantageous rates than those fixed by one or both State Commissions, but this conclusion may be in error and is not a matter which the Board of Managers or the District Attorney is authorized to decide.

II.

History and Analysis of Federal Water Power Act, Also Called Federal Power Act.

Instead of repeating here what was said under this head in No. 205 (this Term) reference is made to our brief in that case for a full discussion of this point, which is there numbered III.

III.

Since Power Company Is a Licensee Under Part I of the Act and the States Concerned Are Not Unable to Agree Through Their Properly Constituted Authorities, Power Company's Rates to Mineral County Are to Be Regulated by State Commission or Commissions Under Sections 19 and 20 of the Act.

Instead of repeating here what was said under this head in No. 205 (this Term), reference is made to our brief in that case for a full discussion of this point, which is there numbered IV.

IV.

Power Company's Rates to Mineral County Are Not Subject to Federal Regulation Under Part II of the Act.

Irrespective of the application of Sections 19 and 20 of the Act, the provisions of Part II, particularly Sections 201, 205, and 206, do not by their language or intent apply to Company's sales to Mineral County. This does not mean that such businesses must go unregulated. California Commission has always considered it a part of the operations of Company's California system and subject to regulation as other rates for distribution of electric energy in California.

The history of the legislation shows that Congress appreciated the existence of a well established and efficiently functioning system of utility regulation in practically all of the states, and did not desire to interfere with or disrupt that establishment. Indeed, this principle was written into the Act (Sec. 201a) where it is said that federal regulation is "to extend only to those matters which are not subject to regulation by the states." This principle was recognized by this Court and the reasons explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), at pages 525-530. It was there said that, while not the sole guide to the interpretation of the Act, it cannot be ignored and some consideration must be given to it. But it is to be feared that some have construed this to require only a nod of recognition in passing, without any appreciable effect on final conclusions.

Large classes of interstate commerce are omitted from the Federal regulatory provisions of Part II and left to State and local regulation. Some of those omissions result from the language of Section 201, which states what facilities and operations are to be included, and other omissions result from definitions. Some of these definitions are found in Part II applicable only to Part II and some are found in Section 3 of Part I applicable to the whole Act, Parts I, II and III.

The classes of interstate commerce which are exempted from regulation under Part II are:

(1) Facilities and sales in local distribution are excluded by Section 201(b), even though electric energy imported from another state may be involved, which, as explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), constitutes typical interstate commerce down to the light bulbs or burner tips.

(2) Transmission or sales in interstate commerce where the energy is not resold by the purchaser but is consumed by the transmitter or by the purchaser are exempted by the provisions of Section 201(b). In order to effect federal regulation, there must be a two-step sale, that is, a sale to, and a resale by the purchaser.

(3) Transmission or sales in interstate commerce where the sales are made to governmental or public agencies or corporations, are expressly excluded by Section 201(d), where "sale of electric energy at wholesale" is defined to mean "sale of electric energy to any person for resale," and by Section 3(3) and (4) defining "person" to mean a private individual, corporation, joint stock company, partnership, association, business, trust, organized group of persons, receiver or trustee.

Power Company's sales to Mineral County are not "sales at wholesale in interstate commerce" subject to Part II because—

(a) They are not sales to a person as provided in Section 201(d);

(b) They are simply a part of Company's distribution business in Mono County, California.

Those points will be discussed separately.

(a) Company's Sales to Mineral County Are Not Sales to a "Person" as Required by Section 201(d).

Section 201(d) provides:

> "The term 'sales of electric energy at wholesale' when used in this Part means a sale of electric energy to any *person* for resale." (Emphasis added.)

Section 3 of the Act defines certain terms "for the purpose of this Act," that is, the whole Act, Parts I, II, and III. Paragraphs (3) (4) of that section define "person" to mean an individual, private corporation, partnership, association or other private organized group.

Therefore, governmental agencies are not "persons" which can be engaged in resale within the meaning of the Act.

This has been so well expressed by the General Counsel for FPC in a brief, filed in August 1951, in *United States ex.rel. Chapman v. Fed. Power Com.*, and *Virginia E. & P. Co.*, Nos 6273 and 6274 in the United States Court of Appeals for the 4th Circuit, that we quote and adopt his language, which, though it had reference only to the United States, is in principle applicable to a State or State agency:

> "'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
>
> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T. V. A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T. V. A., and other Federal agencies; and the Commission.

could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(18) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words

italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *

"From this action, it is abundantly clear that the Committee considered that 'person' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner admits that, according to the literal meaning of Section 201(d), Petitioner is not a "person" to whom energy can be sold for resale under the Act. But, basing its hope on such cases as *United States v. American Trucking Assn.*, 310 U. S. 534, Petitioner urges this

Court to disregard the words "to any person" in Section 201(d), because, it is further asserted, these words crept in with an amendment to the Act and through an inadvertence or "quirk of draftsmanship utterly unintended." It offers no proof of this; indeed its case seems to depend on the absence of any evidence and to gain whatever force it has from the fact that the legislative history is silent on the point of how, why, or by whom the critical words were added.

Respondent Power Company fully appreciates the length to which such cases as *American Trucking Assn.*, have gone, but believes this Court has never yet done any thing so extreme as Petitioner asks it to do here. In that case, the Court, after declaring that:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (P. 543.)

passes by the necessity for disregarding words which produce "absurd or futile results" and comes to the field where the present case is supposed to rest, that is, where

> "* * * the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' * * *." (P. 543.)

and concludes that

> "*A few words of general connotation* appearing in the text of Statutes should not be given a wide meaning *contrary to a settled policy*, 'excepting as a different purpose is plainly shown.'" (P. 544.) (Emphasis added.)

The question there was whether the Motor Carrier Act which authorized Interstate Commerce Commission to prescribe "maximum hours of service of employees," applied to all employees or only those who operated motor vehicles. The former, said the Court (p. 544), would bring a result "quite distinct from the *settled practice* of Congress," which "has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only." (Citing three such acts of Congress and referring to similar acts in forty states.) (P. 545.)

Finally the Court said (p. 545) that the word "employee" was not a word of art and concluded that only those operating motor vehicles on the highways were included under the Act.

There are several clear distinctions between such cases as *American Trucking Assn.*, and the case at bar.

(1) Here the word "person" is a word of art, precisely defined and precisely used, and not merely one of "general connotation." Throughout the Act, the word "person," sometimes with another word qualifying or adding to it, is employed repeatedly and with fine distinction. In addition to its appearance in Section 201(d), the word "person," is used no less than 12 times to include only natural persons, firms, private corporations and the like, to-wit: in Sections 201(e), 202(b), 202(d), 202(e), 304(b), 305(b), 307(c), 307(g), 314(a), 314(b), 316(a), 316(b). Without words of qualifications, it is never used to indicate anything but private individuals, corporations and other private interests. In at least 6 places, where there was a purpose to include both private interests and governmental or public bodies or corporations, there were used, in addition to "person,"

such words as "state," "municipality," "State Commission," etc., to-wit: in Sections 3(13), 23(b), 303, 306, 309(a), 313(a).

(2) The application of Section 201(d) according to its literal meaning does not conflict with any "practice of Congress" and is not inconsistent with any other legislation.

(3) The literal application of Section 201(d) presents no absurd or even unreasonable or unworkable results, nor does it involve any dispute of jurisdiction between FPC and any other federal regulatory agency as in *American Trucking Assn.*

(4) The claim that administrative construction has been contrary to the literal meaning of Section 201(d) and should have weight is without merit, because the first case in which FPC held that it had jurisdiction of rates to municipalities for resale purposes was *Otter Tail Power Co.* (2 FPC 134, 137, 33 PUR NS 257, 260), decided as late as 1940 and not contested for the reason that Otter Tail Power Company requested FPC to take jurisdiction over such rates. The only contested cases were:

Connecticut Light & Power Co., 3 FPC 132 (after 1940);

In the Matter of Wisconsin-Michigan Power Co., FPC Docket E-6268, June 1, 1951;

In the Matter of Interstate L. & P. Co. and Wisconsin P. & L. Co., Docket E-6252, Opinion 215, July 12, 1951.

Certainly that brief and recent experience does not constitute administrative construction.

In *Pacific P. & L. Co. v. Fed. Power Com.* (C. A. D. C.), 184 F. 2d 272, it was held that even though FPC had, over a period of 20 years, issued hundreds of licenses for minor transmission lines purportedly under authority of Section 4(e) of the Act, and even though such licenses were still outstanding, such did not constitute an administrative construction of Section 4(e), and, hence, such minor lines not being "projects" were not within the licensing jurisdiction of FPC.

Petitioner cites *City of Los Angeles v. The Nevada-California Electric Corp.*, 2 FPC 104, 32 PUR NS 193, as of the same type as *Otter Tail Power Co.* (*supra*) and as holding that sales to a municipality for resale are sales to a "person." But that case is cited in error, for no sales at all were involved therein, and, hence, there was no opportunity for any application of the definition of "wholesale" as "sale to a person." In that case, the Company had contracted to transmit power for the City of Los Angeles from Hoover Dam to Los Angeles for a consideration. The power consisted solely of that allocated to the City by the United States at said Dam and belonged to the City from the instant of its generation, the Company at no time having any interest therein. The transaction came under the jurisdiction of FPC as a "transmission of electric energy in interstate commerce" as provided in Section 201(b) and not as a "sale of electric energy at wholesale."

(5) There is no patent defect in Section 201(d) as there is, for example, in the next to last line of Section 205(c) of the Act, where "regulate" is clearly an erroneous substitution for "relate." Nor is there anything incongruous or awkward, or inconvenient or unworkable

about Section 201(d). Its only fault is that certain influential people do not like it. They say it is contrary to the main purpose of the statute, but how do they prove that? The only evidence as to the purpose of the statute with respect to regulation of sales to governmental bodies and public corporations for resale is set forth in Section 201(d), itself, reenforced by Sections 201(e) and 201(f).

The fact that Section 201(d) exempts a certain class of interstate commerce in electric energy does not make it inconsistent with the rest of the Act, for it is admitted that two other classes of interstate commerce are omitted by Section 201(b): (i) distribution of electric energy, even that which has moved in interstate commerce, and (ii) transmission or sales of energy in interstate commerce where the energy is not resold, but is consumed by the transmitter or the purchaser. The consequence, therefore, of one or the other construction of Section 201(d) is merely to include more or less interstate commerce under the Act or to exempt less or more. Neither is inconsistent with the rest of the Act, the only question is: where did Congress draw the line between federally regulated and unregulated sales.

This Court itself has said in *American Trucking Assn.*:

> "Obviously, there is danger that the Courts' conclusion as to legislation purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body."

Petitioner cites other cases which fall within familiar rules of construction but not closely in point here, for example, *Lawson v. Suwanee S. S. Co.*, 336 U. S. 198, where the literal definition in the statute produced obvious

incongruities and absurd results, and *Ohio v. Helvering*, 292 U. S. 360, where the statutory definition, itself, invited exceptions and indicated that it was not of universal application, thus:

> "Where not otherwise distinctly expressed or *manifestly incompatible with the intent hereof*, the word 'person,' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person." (Emphasis supplied.)

Petitioner here assumes a desperate and dangerous position. A desperate position because it asks this Court in effect to strike out the word "person" in Section 201(d) for the *asserted* reason that Congress did not know what it was doing when it used the term but for the *real* reason only of winning this case.

Petitioner's contention is dangerous for it could equally well be applied to practically any statute which is extensively amended on its course through Congress.

It would virtually establish a rule that *where a bill is amended on its way through the Legislature, no critical words inserted by an amendment will be given effect by the courts unless the amendment is accompanied by a Committee or Conference Report showing the intent to insert such words and the purpose thereof.*

Any statutory language could be disregarded which the judges do not *now* think reflects what ought to have been the congressional intent a decade or two ago, or which

does not express what it would have expressed if the Court had been the Legislature.

It can hardly be shown that Congress did not know what it was doing when it used "person" in Section 201(d), because the same word appeared with the same limited meaning in the very next paragraph, 201(e), and both were followed by 201(f) which confirmed and reinforced them by declaring that *no provision (which of course included the definitions in (d) and (e) just above) of Part II should apply to the United States, a state, etc.*

Lengthy hearings and debates were held on the act and such experts as Commissioner Seavey of FPC and Mr. Dozier A. DeVane, Solicitor for FPC, were in attendance, testifying, watching, and assisting in passing the legislation. (Senate Hearings on S. 1725, Apr. 16-29, 1935, 74th Congress, pp. 223, 224, 232-257; House Hearings on H. R. 5423, 74th Congress, 1st Session, Feb. 19, 1935, pp. 384-559.)

It is significant that Section 201(d) has remained undisturbed for 17 years and, if it contained such glaring misprision, such egregious blunder as now alleged so as adversely to affect the United States, the forty-eight states, and several thousand municipalities and governmental agencies, certainly FPC would have asked Congress to correct the error. That it did nothing of the kind indicates that it had no hope of success from that source, but preferred to accomplish the purpose by its own decisions and those which it could persuade the courts to make.

May we not suggest that, in view of the fact that the congressional avenue is still open, it would be inappropriate for this Court to take such unprecedented liberties with legislation functions as it is now asked to do.

(b) Company's Sales to Mineral County Are Merely Part of Company's Distribution Service in Mono County, California, and as Such Are Exempt From Regulation Under Part II.

A distribution system need not be a *typical* distribution system. Company's distribution system and business in Mono County are certainly not *typical* of larger centers of population such as cities or even closely built rural areas. Mono County is a remote, mountainous county, with an average elevation of more than 7,000 feet above sea level, a very sparse population, and little industry, except mining and cattle grazing. Power Company distributes electric energy to the public in said county where and to the extent demanded, but it cannot create power demands or multiply customers beyond the capacity of the county's population and economy. Power Company's facilities at and about the Mill Creek Plant, including the 55 kv line extending from Mill Creek to Leevining substation are used principally for the distribution of power in that locality, including the Navy's purchases for use in its ammunition depot.

There is no generally recognized standard of distinction between the transmission and the distribution of electric energy, either engineeringly or legally, and if facilities are

used at all in local distribution, that ends the matter so far as FPC jurisdiction is concerned, even though they are also used for transmission.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

Section 201(b) exempts facilities used in local distribution, but does not require that they be used exclusively for that purpose. If they are used for local distribution at all, they are exempt. The situation is analogous to that in *Jersey Central P. & L. Co. v. Fed. Power Com.* (*supra*), where it was held that, since the transmission of electric energy in interstate commerce constituted the Company a public utility under the act, and since Congress had not specified any percentage no matter how small that might be disregarded, therefore; the transmission of any energy whatever in interstate commerce, even unintentionally, was sufficient to include that Company. So here, since Congress has not specified any amount or proportion of distribution that must be carried on to constitute "use in distribution," any distribution at all is sufficient to exempt facilities from FPC jurisdiction. Since the facilities are used in distribution, the energy sold therefrom is sold in distribution and is purely intrastate commerce.

Conclusion.

This case should be dismissed because:

1. Company's rates to Mineral County are, at this stage, subject to regulation by state or state commissions and not by FPC.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1952.

12-31-52—80

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 5 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States.

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,
Petitioner,

vs.

THE PUELIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and the CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
514 State Building, San Francisco 2, California,
Attorneys for Respondent Public Utilities Commission of the State of California.

PERN & WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

2. Company's sales to Mineral County are not sales to a person as defined in the act and, therefore, not subject to regulation under Part II of the act.

3. Company's service to Mineral County is merely a part of its distribution business in Mono County, California, and therefore was subject to regulation under Part II of the act.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for California Electric Power Company.

H. M. HAMMACK,
KENNETH M. LEMON,
Riverside, California.
Of Counsel.

APPENDIX.

Rate Regulation Provision of Licenses.

Article 23 of Licenses for Projects 1388 and 1390, Article 25 of Project 1389, and Article 28 of Project 1394.

* * *

"The licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control; provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

STATEMENT.

California Electric Power Company is engaged in the business of furnishing electric energy in certain eastern portions of California and also in two counties of Nevada (Gov. R. 7).

Since 1936 the Company has been selling energy to Mineral County at Mill Creek, California (R. 26). The Company delivers the energy in California at the 55 kv station bus at its Mill Creek, California, generating plant. From there, Mineral County transmits the energy over its own 55 kv. transmission line, running partly through California and partly through Nevada, to Mineral County where the County resells the energy to its retail customers.

A large percentage of the energy furnished Mineral County is derived from Company hydroelectric projects located in California but operated under federal license under Part I of the Federal Power Act by virtue of location on public lands or on navigable streams (Gov. R. 11). At times, however, all or a portion of the energy comes from non-licensed sources (Gov. R. 11).

In October, 1947 California Electric Power Company applied to the California Commission for a general increase in electric rates throughout its system. Extensive hearings were conducted. Among other evidence, the revenues and expenses in connection with the sales to Mineral County were considered (Gov. R. 8). On July 1, 1948 the California Commission issued its Decision No. 41798 (48 Cal. P.U.C. 183) authorizing rate increases spread equitably

among the several classes of consumers in accordance with accepted practice (Gov. R. 8). It prescribed Schedule P-3 for customers of the same type and kind as Mineral County, but it did not expressly name the County.

The question soon arose whether such rate decision should be construed to apply to sales to Mineral County, and the Company filed a supplemental application with the California Commission seeking a determination on that point. In the midst of the hearings thereon, the Federal Power Commission issued an order to show cause against the Company upon the theory that it, not the California Commission, had jurisdiction over the sales to Mineral County. By mutual agreement of the two commissions, a concurrent hearing was held to explore the jurisdictional question (Gov. R. 7). The Chairman of the Nevada Public Service Commission stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He said he would not know what the position of the Nevada Commission would be, until after the matter of jurisdiction had been decided (No. 495, this Term, Tr. of Record 153). Subsequently, each commission rendered its opinion, each finding that it, rather than the other commission, had jurisdiction (California Commission Decision No. 45913, issued July 3, 1951 (Gov. R. 6-19); Federal Commission Opinion No. 212, issued April 13, 1951 (Gov. R. 24)). The Federal Commission opinion had been preceded by a federal hear-

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In the Supreme Court
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Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and the CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (Gov. R. 6-19)[1] is reported at 50 Cal.

[1] "Gov. R." refers to the record in No. 205, this Term.

P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is reported in 38 Adv. Cal. 323 (R. 38) and its order denying rehearing is reported in 38 Adv. Cal. 484 (R. 46). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The California Supreme Court denied a writ of review respecting the decision of the California Public Utilities Commission on January 21, 1952 (R. 38), and denied rehearing on February 18, 1952 (R. 46). The County of Mineral sought and obtained an order extending time for filing a petition for writ of certiorari to July 17, 1952 (order of Mr. Justice Douglas, dated May 1, 1952 (R. 47)). Petition for writ of certiorari was filed July 16, 1952 and was granted October 13, 1952. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED.

The ultimate question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, authorize and direct California Electric Power Company to charge certain rates in selling electricity in California to the Mineral County Power System (the operating name for the County of Mineral, Nevada), Mineral County Power System taking delivery in California and trans-

mitting the energy over its own lines to Nevada for resale to its customers in that state.

More specifically, the principal questions are:

Whether under Part II of the Federal Power Act the Federal Power Commission can claim jurisdiction over the sales to Mineral County even though that Commission's jurisdiction over sales is limited to interstate sales "to any person for resale" and Mineral County is not a "person" as defined "for purposes of this act" in Section 3(4).

Whether, if the conditions to state jurisdiction vouchsafed by Section 20 of Part I are met, that circumstance precludes Federal Power Commission jurisdiction under Part II because of the provision in Section 201(a) that such jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

Whether under Part I the conditions to state jurisdiction contained in Section 20 are met, viz., that the states directly concerned have provided regulatory commissions with authority to enforce the requirements of Section 20 and such states have not been shown "unable to agree" through their properly constituted authorities.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) are set out in Appendix A, *infra*, pp. 31-39.

in committee reports as proving that Congress meant to cover a situation to which it had given no thought.

Finally, it should be noted that, while the position of petitioner that the identity of purchaser of wholesale power is immaterial has met with approval before three federal courts (*California Electric Power Co. v. Federal Power Commission*, 9th Cir., No. 12987 (1952); *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F. 2d 472 (7th Cir.); *Wisconsin, et al. v. Federal Power Commission* and *Wisconsin Power and Light Co. v. Federal Power Commission*, D.C. Cir. Nos. 11224, 11225); no consideration was given by those courts to the fact that, while there is need for protection in the case of an ultimate consumer who buys from a public utility, there is no such need in the case of an ultimate consumer who purchases from a governmental agency. The policy of Congress as manifested in the Federal Power Act does not extend to this latter situation.

B. Even though the sales to Mineral County do fall within the principle of the Attleboro case and by virtue of the interstate commerce clause are beyond jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act of 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. Part I, Section 20. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only to those matters which are not subject to regulation by the States."

This conclusion in the first place follows the natural meaning of the phrase "extend only to those matters which *are not subject to regulation by the States.*" (Sec. 201(a). Emphasis added.) The phrase contains no limitation. It says that, whenever the states have jurisdiction, regardless of the source of that jurisdiction, authority is withheld from the Federal Power Commission. The states may have jurisdiction because the interstate commerce clause does not forbid it. Or the states may have jurisdiction because, while falling under the ban of the interstate commerce clause, Congress has, nevertheless, conferred jurisdiction upon them, as it has power to do. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1944). That is precisely what Congress has done in Section 20 of Part I where interstate sales of power by a licensee are involved and the conditions to state jurisdiction set forth in that section are met.

Such literal construction of the phrase "extend only to those matters which are not subject to regulation by the States" is wholly in keeping with the legislative history and the aim of Congress. The committee hearings, the committee reports and the words on the floor of Congress pertaining to Part II are all replete with statements that Part II was designed to fill the gap in regulation revealed by the *Attleboro* decision, *but to do no more,* ensuring to the states whatever authority they were already able to exercise, regardless of the source of that authority. The phrase in question was used with the express purpose of guaranteeing to the states *all* of their previously possessed authority, even that given them by the Federal Water Power Act of 1920, which was incorporated as Part I of the Federal Power Act. It is often forgotten that the Federal Water Power Act of 1920 was in effect when the *Attleboro* decision came down in 1927 but was not involved in that case because the energy in question came from non-licensed sources. Surely, no one can doubt that, if licensed power had been involved, the sales would have been "subject to regulation by the States" assuming the conditions of Section 20 could be met.

The foregoing construction of the phrase "extend only to those matters which are not subject to regulation by the States" has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances. The problem of jurisdiction in *Pennsylvania Water Co. v. Federal Power Commission,* 343 U.S. 414 (1952),

ing examiner's decision which coincided with the California Commission's views and denied Federal Commission jurisdiction (No. 495, this Term, Tr. of Record 13-52).

The California Commission Decision No. 45913 was made the subject of petition for writ of review filed by Mineral County before the California Supreme Court. That Court's action denying review (R. 38) constituted a determination upon the merits.

California Public Utilities Code, Sections 1756-1760 (Cal. Stats. 1951 ch. 764; formerly Public Utilities Act, Section 67)

Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920)

Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 747 (1936).

Subsequently, the California Supreme Court denied rehearing (R. 46) and the cause was then brought here upon writ of certiorari.

The Federal Commission Opinion No. 212, on the other hand, was made the subject of review before the Court of Appeals for the Ninth Circuit. That Court affirmed the Federal Commission's opinion (*California Electric Power Co. v. Federal Power Commission,* 9th Cir, No. 12987, decided October 14, 1952). Petition for writ of certiorari is now pending before this Court (this Term, No. 495).[2]

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[2]In the foregoing statement, reference has been made not only to the transcript of record before this Court in this proceeding but also to the transcript of record before this Court in the companion proceeding involving sales to the Navy (this Term, No. 205) and in the cognate proceeding No. 495, this Term, (respecting which peti-

SUMMARY OF ARGUMENT.

Both Part I and Part II of the Federal Power Act must be considered in determining whether jurisdiction may properly be exercised by the California Commission over the sales to Mineral County. This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to *both* Part I and Part II. 343 U.S. at 419.

A reading of the pertinent portions of the California Commission decision (Gov. R. 10-16) makes clear that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

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tion for writ of certiorari is pending). While we would have questioned the propriety of such course, petitioner has followed it in its brief, and, since there is no dispute respecting the facts, it is doubted whether any harm can come from the loose practice in which the petitioner apparently wishes to indulge.

Specifically, the sales to Mineral County are of energy derived partly from licensed sources. In addition, the petitioner argues that such sales are at wholesale in interstate commerce within the meaning of Part II. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first.

Under Part II, the sales to Mineral County are excluded from Federal Power Commission jurisdiction for two separate reasons:

(A) The sales are not to a "person." The wholesale sales in interstate commerce over which the Federal Power Commission is given jurisdiction under Part II are defined as sales "to any person for resale." Part II, Section 201(d). The petitioner would admit that literally "person" as defined in the Act (Section 3(4)) excludes Mineral County. By adoption of the Government's brief in No. 205, it argues that a literal construction would produce a result at odds with the purpose of Congress. However, far from being at odds with the purpose and aim of Congress, the literal construction is entirely consistent. The petitioner's argument contains the fundamental weakness of assuming that purchasers from a governmental agency are in the same position as members of the general public purchasing electricity from a private utility and in need of the same protection. Sensing such weakness, the petitioner shifts its ground to the proposition that it is the seller of power rather than the consumer which Con-

gress aimed to protect and that surely Congress must have intended to give the petitioner as much protection as it gave public utilities. (Gov. Brief 32.) However, the legislative history reveals that Congress was not concerned at all about the welfare of public utilities but only of ultimate consumers. Finally, the petitioner indulges in a specious legislative history argument designed to show that Congress did not know what it was doing when it used "person" in section 201(d). Such argument can readily be disposed of.

(B) Even though the sales to Mineral County do fall within the principle of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) and by virtue of the interstate commerce clause are beyond state jurisdiction in the absence of a specific grant of authority by Congress, Congress did in fact by the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, confer upon the states jurisdiction over interstate sales of licensed power provided certain conditions set forth in Section 20 were met, viz., that the states directly concerned had qualified regulatory commissions and that such states were not shown unable to agree respecting the rates in question. It follows that, whenever upon the facts of a given case the conditions to state jurisdiction provided in Section 20 are met, Section 201(a) operates to preclude Federal Power Commission jurisdiction under Part II, inasmuch as Section 201(a) declares that Federal Power Commission jurisdiction shall "extend only

to those matters which are not subject to regulation by the states."

This conclusion not only follows the natural meaning of the language of Section 201(a), but is impelled by the legislative history and has the great merit of making it possible to reconcile the jurisdictional provisions of Parts I and II under all circumstances.

Turning to Part I, the California Commission is permitted to exercise jurisdiction over the sales to Mineral County because all of the conditions to state jurisdiction set forth in Section 20 are met. State jurisdiction is vouchsafed by Congress over interstate sales by licensees where the states directly concerned have provided commissions to enforce the requirements of the section and where such states are not unable to agree on the rates to be charged.

(A) Even though California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State." Contrary to the petitioner's argument that Section 20 requires state commissions with compact powers, it is clear that Congress contemplated no more than a commission in each state with authority to fix just and reasonable rates "within such State." Both California and Nevada have such commissions.

(B) Even though California and Nevada are both states "directly concerned," they have not been shown unable to agree through their properly constituted authorities respecting the rates which the California

Commission directed California Electric Power Company to charge Mineral County. To circumvent the effect of this admitted fact, the petitioner seeks to have read into Section 20 a requirement which is not there, viz., that the states must enter into affirmative agreements before they can claim jurisdiction to the exclusion of the Federal Power Commission. Actually, Section 20 vouchsafes state jurisdiction so long as there is an absence of disagreement. Nevada upon the facts has not disagreed in any manner respecting the California Commission's authorization of rates for sales to Mineral County.

The argument herein assumes that the sales in question are in interstate commerce because such assumption was made by the California Commission in reaching its decision. Furthermore, and for the same reason, no reliance is placed on Section 201(f) of Part II. The brief of the second respondent, California Electric Power Company, deals with these matters.

ARGUMENT.

I. BOTH PART I AND PART II OF THE FEDERAL POWER ACT MUST BE CONSIDERED IN DETERMINING WHETHER JURISDICTION MAY PROPERLY BE EXERCISED BY THE CALIFORNIA COMMISSION OVER THE SALES TO MINERAL COUNTY.

This Court has now made it clear, contrary to the repeated contentions of the Federal Power Commission, that Part II, enacted in 1935, did not repeal by

implication the Federal Water Power Act of 1920, incorporated as Part I of the Federal Power Act in 1935, so to place interstate wholesale sales of licensed power solely under Part II. The sales in *Pennsylvania Water Co. v. Federal Power Commission*, 343 U.S. 414 (1952), were interstate wholesale sales and therefore seemed to fall under Part II; they were also sales of licensed energy and therefore seemed to fall under Part I. This Court specifically declared the sales to be subject to both Part I and Part II. 343 U.S. at 419.

Even in the face of the *Pennsylvania Water* case, petitioner by adopting the Government's brief in No. 205 argues for repeal by implication. (Gov. Brief 54, 55.) Despite the clear statement that jurisdiction was given under Part I, Section 20, as well as under Part II, over the sales in question, viz., interstate sales for resale of licensed energy, the Government urges, "if the question should be reached in the present case that Section 20 does not extend to interstate sales for resale and that, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act" (Gov. Brief 55n). We submit that the petitioner is unwarranted in treating this Court's statement respecting Part I as dictum. Furthermore, this Court has now made clear that the provisions of Part I must be accorded as much vitality as the provisions in Part II, even to the extent that seemingly overriding provisions of Part II will not be construed as "a repeal by implication of the powers over licensees that are deeply engrained in Part I of the

Act and put there by Congress for the purpose of protecting the public domain." *Federal Power Commission v. Idaho Power Co.*, ... U.S. ....., 97 L. ed. (Advance p. 9, 13).

Contrary to the assertions that the California Commission came to its conclusion upon an erroneous assumption that Part I alone is to be considered when licensed power is involved (Gov. Brief 16, 53), a reading of the pertinent portions of the California Commission's decision (Gov. R. 10-16) makes clear that such decision was careful to assume that *both* Part I and Part II were relevant in determining jurisdiction. Thus, the California Commission's approach proved to be wholly in accord with the subsequent views expressed by this Court in the *Pennsylvania Water* case.

The sales to Mineral County are of energy derived partly from licensed sources. In addition, the petitioner argues that such sales are at wholesale in interstate commerce within the meaning of Part II. Therefore, both Part I and Part II of the Federal Power Act must be examined. It will be expedient to take up Part II first.

II. UNDER PART II THE SALES TO MINERAL COUNTY ARE EXCLUDED FROM FEDERAL POWER COMMISSION JURISDICTION FOR TWO SEPARATE REASONS.

A. The sales are not to a "person."

The wholesale sales in interstate commerce over which the Federal Power Commission is given juris-

diction under Part II are defined as sales "to any person for resale." Part II, Section 201(d).

Even if it be conceded that the sales are "in interstate commerce" within the Act, they are not sales to a "person." At the very time the language of Section 201(d) was adopted, Congress also enacted in the same statute a new subsection defining the word "person." Part I, Section 3(4). Mineral County admits that "person" as thus defined excludes it, inasmuch as Section 3(4) states that " 'person' means an individual or a corporation" and Section 3(3) declares that " 'corp ation' . . . shall not include 'municipalities' as hereinafter defined," "municipality" being defined in Section 3(7) to include ". . . political subdivision of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

Petitioner does a number of things to escape the literal meaning of "person" as used in Section 201(d) and as defined in Section 3(4):

(1) Respecting the legislative history, it indulges in an intricate, ill-conceived argument, remarkable only for its ingeniousness (Gov. Brief 40, 41, 43). It elaborately argues that the section defining "person," Section 3(4), which appeared in the original bills before Congress in 1935 (S. 1725, H.R. 5423, 74th Cong., 1st Sess.) must not be construed to extend to Section 201(d) because the language of Section 201(d) as finally enacted and containing the word "person" did not appear in those original bills but, on the contrary,

was inserted later on in the session and that, in any case, Congress, when it did insert the language containing the word "person" in Section 201(d), was not thinking about the definition of the word "person" found in Section 3(4) of the bill because it was only aiming "to close an obvious loophole in another aspect." Such reasoning not only imputes to Congress notable carelessness in draftsmanship but defies the canon of construction that "an omission at the time of enactment, whether careless or calculated, cannot be judicially supplied."[3]

We submit that the legislative history leaves no mistake that "person" as defined in Section 3(4) was meant by Congress to have the same meaning throughout the Act; including Section 201(d).[4] Not only had "person" not been defined at all in the Federal Water Power Act of 1920, but, when the word was defined for the first time in 1935, the Solicitor of the Federal Power Commission, one of the chief draftsmen for the new legislation, expressly stated, "We also used the word 'person' because in the drafting of the act, *and particularly in the new part of the act,* you could use the word 'person' with brevity and it made simplification for drafting" (emphasis added). *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423,* 74th Cong., 1st Sess. 460 (1935).

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[3]Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 534.

[4]That the petitioner recognizes the dangerous ground on which it treads is manifested by its "caveat" (Gov. Brief 38, 39) that "We do not suggest that either the United States or municipalities are 'persons' or 'corporations' for all purposes under the Federal Power Act."

Furthermore, while the original bill offered in the House (H.R. 5423 74th Cong., 1st Sess.) contained language restricting the effect of the definition section, such restriction was left out in the final Act. The original proposal was that Section 3 should start, "For the purposes of this Act, *unless the context otherwise requires* . . ." (emphasis added). When questioned about the situations where the context *would* otherwise require, the Solicitor for the Federal Power Commission said he would study the matter and report back. He subsequently reported that there were no situations where the context would "otherwise require." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 459, 460, 485. The clause "unless the context otherwise requires" was significantly omitted from the Act as passed.

We recognize that petitioner will be quick to apply to the above facts in the legislative history the same kind of intricate argument as that earlier alluded to and will contend that statements made by the Solicitor must not be given weight because "person" was inserted in Section 201(d) only toward the close of the session. Again, such argument would improperly impute to Congress reprehensible carelessness in draftsmanship.

(2) The petitioner next indulges in a policy argument designed to show that, regardless of the literal meaning of Section 201(d), Congress did not mean to exclude the sales to Mineral County. (Gov. Brief 31-40.) The petitioner very properly observes that

a literal construction of a statute must give way if the result would be plainly at variance with the policy of the legislation as a whole. It develops this thesis with erudition and a wealth of citation.

We submit, however, that not only does the legislative history forbid "person" to be construed as one thing in Section 201(d) and something else in the rest of the Act, but that the aims and policies of Congress are fully carried out by giving "person" in Section 201(d) the meaning which Congress has declared it is to have "for purposes of this act" in Section 3(4).

The hearings before the respective committees of Congress, the reports of those committees and the words on the floor of Congress are replete with expressions of the aim of Congress to fill the gap in state regulation revealed in *Public Utilities Commission v. Attleboro Co.*, 273 U.S. 83, and thereby to protect those members of the general public from excessive rates who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. E.g., *Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423*, 74th Cong., 1st Sess. 497 (1935); *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. 250 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess. 48, 49 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7, 8 (1935). Such purpose has been frequently noted by this Court. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610;

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507, 514-521; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 335-336.

Purchasers from a governmental agency are not in the same position as members of the general public who are ultimate consumers purchasing electricity from a public utility which, in turn, purchases the energy at wholesale in interstate commerce. The difference in position is very real. The petitioner attempts to obfuscate it by a hurried shift to the specious ground that Congress intended to protect public utilities and governmental agencies alike in selling to ultimate consumers. (Gov. Brief 32.) Certainly, Congress was not concerned with protecting public utilities when it enacted the Federal Power Act.

The vital difference between purchasers from a governmental agency and those members of the public whom Congress *did* intend to protect is that purchasers from a governmental agency are not in need of protection. There is a close similarity of interest between a governmental agency and its purchasers. Mineral County itself is in an entirely different category from a public utility engaged in the business of selling to ultimate consumers. Unlike public utilities which might be willing, and, indeed, have shown themselves willing in the past, to purchase wholesale power in interstate commerce at exorbitant costs so long as they could pass such costs on to ultimate consumers, Mineral County has the public duty of entering into electric purchase contracts only if they are consistent

with its obligations as a political subdivision of Nevada. It follows that in the case of purchasers from the County the very factor is absent which motivated the Congressional policy given expression in the Federal Power Act.

Admittedly, as the petitioner points out, the committee reports of Congress (Sen. Rep. No. 621, H.R. Rep. No. 1318, H.R. Rep. No. 1903, 74th Cong., 1st Sess.) speak in general terms about wholesale sales in interstate commerce without reference to the identity of the purchaser, as being the sales meant to be covered by Part II, but surely the petitioner would have to agree that such general language must be understood in its context which expressly dealt with the *Attleboro* situation, to repeat, a situation where protection is needed for members of the general public who are ultimate consumers purchasing electricity from a public utility[5] which, in turn, purchases the energy at wholesale in interstate commerce. The transcripts of Congressional committee hearings, the reports of those committees and the record of the comments on the floor of Congress in 1935 in connection with the Federal Power Act can all be searched in vain for any reference to the kind of sales here in issue. Clearly, the instant case is, as the petitioner puts it, a situation unforeseen. Therefore, the petitioner is not entitled to rely upon the broad language

[5]Even private individuals or organizations in providing electric service to their tenants have by the great weight of authority been held to be not engaged in the business of public utility service. E.g., *Stopy v. Richardson*, 186 Cal. 162, 198 Pac. 1057 (1921); *Jonas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, PUR 1928D 825 (1928); *In Re Fulton*, PUR 1930D 11 (Mo. 1930).

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service,

or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition

happened to be easy because Part I and Part II taken separately both produced the same result that jurisdiction vested in the federal agency. But, suppose the states had *not* been shown "unable to agree". Then Part I, Section 20, standing alone would have operated to vest jurisdiction in the states and Part II standing alone and without reference to the language in Section 201(a) would have operated to vest jurisdiction in the Federal Power Commission. However, by giving Section 201(a) the vitality which Congress meant it to have, the conflict is resolved. The sales would be "subject to regulation by the States" because of Part I, Section 20; therefore, Section 201(a) would operate to deny jurisdiction to the Federal Power Commission under Part II.

Upon the facts in the instant case, the conditions to state jurisdiction set forth in Part I, Section 20, are in fact met, as shown in the following section of this brief.

III. UNDER PART I, DEALING WITH SALES OF ENERGY BY LICENSEES OF FEDERAL POWER PROJECTS, THE CALIFORNIA COMMISSION HAS JURISDICTION OVER THE SALES TO MINERAL COUNTY BECAUSE ALL OF THE CONDITIONS TO STATE JURISDICTION SET FORTH IN SECTION 20 ARE MET.

Conceding that the sales to Mineral County are in interstate commerce, then, under Section 20, Congress has conferred jurisdiction upon the Federal Power Commission only if: (a) "any of the States directly concerned has not provided a commission or other

authority to enforce the requirements of this section [20] within such State" and (b) even though the requisite state commissions or other authorities have been provided, only if the states "directly concerned" are "unable to agree" on the service or rates through their properly constituted authorities.

A. Even though California and Nevada are both states "directly concerned," each has "provided a commission or other authority to enforce the requirements of this section [20] within such State."

The California Public Utilities Commission is vested by the California Constitution, article XII, section 23, and by the Public Utilities Act (Public Utilities Code, Sections 451, 453, 454 (Cal. Stats. 1951, ch. 764)) with broad regulatory powers over the rates of public utility electric companies operating within the state.

Similarly, the Nevada Public Service Commission is vested with authority to regulate the rates of public utility electric companies providing service to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Sections 6100-6146.

We submit that such state commission regulatory control is all that Section 20 contemplates when it speaks of "a commission or authority to enforce the requirements of this section within such State." The context reveals that the "requirements of this section" are that "the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for

sale and distribution or use in public service shall be reasonable . . . to the customer." The section contemplates state commissions of the usual kind with authority to fix rates within their own respective states. This is evident from the quoted language which contemplates that one state shall have regulatory power over the licensee and the other state regulatory power over the purchaser from the licensee. It is further evident from use of the phrase "the requirements of this section within such State."

To counter the foregoing conclusion, the petitioner simply reads into Section 20 what is not there. It declares that to qualify under Section 20 a state commission must have affirmative power to agree on a rate fixed in another state. (Gov. Brief 58-62.) It refers to the *First* and *Second Safe Harbor Cases* (*Safe Harbor W. P. Corp. v. Federal Power Commission,* 124 F. 2d 800 (3d Cir.) certiorari denied, 316 U.S. 663; *Safe Harbor W. P. Corp. v. Federal Power Commission,* 179 F. 2d 179 (3d Cir.) certiorari denied 339 U.S. 957) which did in fact involve state commissions with power to enter into agreements with other state commissions. While it is true that in the *Second Safe Harbor Case* the court indicated a belief that Section 20 contemplated state commissions with compact powers, the fact remains that no affirmative action between the two state commissions took place and yet the court declared they had been shown "unable to agree" under the terms of Section 20, by virtue of certain correspondence by one of the commissions, directed not to the other commission but to

the Federal Power Commission. 179 F 2d 179, 189-193.

We submit that, had Congress, when it first used the language of Section 20 in the Federal Water Power Act of 1920, meant to encompass within its terms only state regulatory bodies having compact powers, it would have done so in direct terms. The unusual grant of compact authority is not lightly to be presumed as having been conferred by indirection, especially since the policy of Congress expressed in Section 20 can be effectuated without any such interpolation. The policy was to ensure that "the rates . . . and the services . . . by any licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable." The state where the licensed power is first sold can ensure the reasonableness of the rate by having a commission with authority to fix the wholesale rate. California has admitted power not only over retail but wholesale rates of utilities operating within the state.[6] The state where the licensed power is ultimately consumed can ensure the reasonableness of "the rates . . . by any person, corporation, or association purchasing

[6]California Public Utilities Code (Cal. Stats. 1951, ch. 764) provides in Section 216(c): "When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the State, which in turn either directly or indirectly, mediately or immediately, performs such service or delivers such commodity to or for the public or some portion thereof, such person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

power from such licensee for sale and distribution or use in public service" if it provides a commission with authority to fix such rates,[7] and if it is given the indirect control over the wholesale rate vouchsafed by Section 20, viz., the power to have jurisdiction over that rate automatically transferred to the Federal Power Commission merely by stating its disagreement with such rate. That was in fact the manner by which Federal Power Commission jurisdiction was obtained in the *Second Safe Harbor Case*, and no one can deny that the consumers in Maryland, the state of ultimate consumption, were thereby protected.

B. California and Nevada have not been shown "unable to agree through their properly constituted authorities" respecting the rates which the California Commission directed California Electric Power Company to charge Mineral County.

The petitioner no doubt concedes that this is true upon the facts. Therefore, it reads into Section 20 a requirement that states directly concerned must affirmatively agree upon a given rate in order to obtain jurisdiction over interstate sales by licensees. (Gov. Brief 62.) However, as we have already shown, Section 20 does not envisage state commissions with

[7] The Nevada Public Service Commission has jurisdiction over the rates charged by utilities to ultimate consumers in Nevada. Hillyer's Compiled Nevada Laws, 1929, Section 6116. It also has jurisdiction over the rates charged by Mineral County to its customers. Nev. Stats. 1925, p. 55, Section 16.

The petitioner points out that the Nevada Public Service Commission has no authority over wholesalers of electric power in Nevada (Gov. Brief 59n), but that circumstance is immaterial upon the facts, the wholesale sales having occurred not in Nevada but in California.

compact powers nor any complicated machinery before Federal Power Commission jurisdiction may be invoked. The section envisages state commissions of the usual kind with local, not extraterritorial powers, and a mere inability by the state of consumption to agree with the wholesale rate imposed by the other state is sufficient to invoke Federal Power Commission jurisdiction. As already noted, Federal Power Commission jurisdiction was invoked by this simple means in the *Second Safe Harbor Case*. No complicated compact machinery was contemplated by Congress, nor was any needed to effectuate its policy.

CONCLUSION.

The foregoing analysis clearly demonstrates that in the instant case neither Part I nor Part II conferred jurisdiction upon the Federal Power Commission. Such analysis further demonstrates that the California Commission is not precluded from exercising jurisdiction by Part II, and that Part I authorized the California Commission to exercise jurisdiction.

This is a case where the eloquent admonition of Mr. Justice Frankfurter is particularly applicable:

> "The underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of Congressional legislation regulating not only interstate commerce as such

but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those entrusted with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'"[8]

It is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be affirmed.

Dated, San Francisco, California,
January 2, 1953.

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,
Attorneys for Respondent Public Utilities Commission of the State of California.

[8]Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 540.

(Appendix A Follows.)

Appendix A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates

and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and

distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interest commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy

at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any

one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

* * * * * * *

SEC. 313 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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IN THE

Supreme Court of the United States

October Term, 1952
Nos. 205 and 206

No. 205

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY,

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY, a Corporation.

On Writs of Certiorari to the Supreme Court of the State of California.

MOTION FOR REHEARING.

HENRY W. COIL,
DONALD J. CARMAN,
3845 Market Street,
Riverside, California,
Attorneys for Respondent California Electric Power Company, Riverside, California.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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MOTION FOR REHEARING.

Respondent, California Electric Power Company, moves the Court for a Rehearing herein for the purpose of reconciling the judgment herein and the judgment of the

Court of Appeals for the 9th Circuit in No. 12987 (No. 495 this Court), entitled California Electric Power Company, a corporation, Petitioner, v. Federal Power Commission, Respondent, and County of Mineral, State of Nevada, and United States of America, Intervenors, and as grounds therefor states:

The judgment herein was entered on April 6, 1953, reversing the judgment of the Supreme Court of California which had affirmed the order of California Public Utilities Commission, holding that said Commission had exclusive jurisdiction over rates charged by Power Company to the United States Navy and Mineral County, but stating in the Opinion of this Court that the question was not ripe for decision, because the record in these cases did not disclose whether or not energy sold by Power Company for resale could be segregated from that sold for consumption, and indicating that California Public Utilities Commission should have an opportunity to consider that problem and perfect the record. This Court expressly distinguished *Pennsylvania Water and Power Co. v. FPC*, 343 U. S. 414.

On April 13, 1953, this Court denied the petition of California Electric Power Company in No. 12987 (No. 495 this Court) for Certiorari to correct the judgment of the 9th Circuit which held that the same state of facts was governed by *Pennsylvania Water and Power Co. v. FPC (supra)* and indicating that, not only in that case, but in practically all such cases, it would be impossible or inexpedient or too much trouble to segregate energy sold for resale from energy sold for consumption.

It is obvious that the theory of the 9th Circuit was not followed by this Court, the reasons given being not only that this case was not the same as *Pennsylvania Water and Power Company v. FPC (supra)*, but that possibly even FPC had altered its views since the order of April 12, 1951, was entered, which is involved in all these cases. This Court cited *Colorado Interstate Gas Co. v. FPC*, 185 F. 2d 357, and *City of Hastings v. Kansas-Nebraska National Gas Co., FPC*, Opinion No. 244, February 5, 1953.

In *City of Hastings v. Kansas-Nebraska National Gas Co. (supra), FPC*, Mr. Commissioner Buchanan in dissenting, relied strongly on the decision of the 9th Circuit in *California Electric Power Company v. FPC (supra)*, but the majority of the Commission, though mentioning that case, did not follow it, but held that gas sold to the City of Hastings through a single gate or pipeline for resale and also for consumption could be segregated between that subject to FPC jurisdiction and that subject to state jurisdiction.

It has probably been overlooked that the record lodged with this Court in No. 12987 (No. 495 this Court) *California Electric Power Company v. FPC*, Exhibit 32 (introduced by United States) shows the segregation by years 1943-1948 and Exhibit 22 for years 1949 to February, 1950.

The reason why in these cases there is no history of separate negotiations or contracts for resale and consumed power is that apparently neither Navy nor Power Company ever considered that there was any sale or purchase for resale. The power negotiated and contracted for was "for use of the Government's Naval

Ammunition Depot, Hawthorne, Nevada." [Ex. 1, Case No. 495.]. "Resale" was first mentioned after the matter was presented to FPC by Navy and discriminating legal interpretations began to be placed on the acts of the parties.

We also suggest that it is probably not correct to place so much emphasis on contractual arrangements or provisions, for the jurisdiction of FPC depends on statutory classification arising from the nature of the commerce itself and not the names, terms, or interpretations which the parties by contract or otherwise place upon it.

We submit that in justice to Respondent Company and especially to a state regulatory body such as California Public Utilities Commission, this Court should explain by memorandum or otherwise that it intended to qualify the opinion of the 9th Circuit in No. 12987 (No. 495 this Court), so as to recognize the legal separability of power sold for resale and power sold for consumption through common facilities if the separation is scientifically or practically possible.

Respectfully submitted,

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for Respondent California Electric Power Company, Riverside, California.

April 17, 1953.